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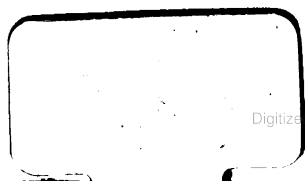
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# A BRIEF

FOR

## THE TRIAL OF CIVIL ISSUES

BEFORE

### A JURY.

---

By AUSTIN ABBOTT,  
OF THE NEW YORK BAR.

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It is equally important to know the exact extent  
and limit of a right, whether counsel intends  
to insist, or thinks wiser to let it pass.

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SIXTH THOUSAND.

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VIA RAIL AND MARINE

## PREFACE.

While the merits of every case may be a fair field for the contest of opposing opinion, the main rules of practice according to which that contest is to be carried on ought to be well understood and applied with as little difference of opinion as may be. The chief burden under which the business of the profession and the labors of the bench now suffer is the great number of mistrials, and consequent new trials, which result, from the imperfect manner in which these rules are understood and applied.

In these pages, which are the outgrowth of briefs I have had occasion to prepare in practice, I have endeavored to state fairly the rules of forensic contest, on points that are frequently so disputed as to make it desirable to be prepared to cite authority at the trial.

I mention, however, only a small proportion of the authorities examined, believing that for the purpose of a brief a few well chosen are more useful than a mass. On questions of chief importance I have, however, given one or more recent authorities from each of a number of states.

Space has not allowed a full statement of the statutes and rules of court of other jurisdictions than New York ; but I trust that I have indicated the existence of such statutes in such a way that the intelligent practitioner in any jurisdiction cannot be misled.

In making up a list of "Useful Authorities on Evidence" (Division XIII.), I have not confined myself to stating what I deem to be settled law, deeming it there more useful to index concisely the best authorities, including some debatable points, rather than to take space to state each rule at length.

In these days more good verdicts are set aside, or hopes of verdict frustrated, by errors in regard to whether the case should go to the jury or not, than from any other cause. On the subject of "Taking the Case from the Jury" (Division XV.), I have stated the rules which, if I rightly understand the existing law as to New Trials, and Appeal, ought to govern our trial courts in disposing of motions for a nonsuit, or to direct a verdict, and demurrers to evidence. I am not aware that these rules are anywhere else shortly and systematically stated, nor have I found it practicable to state them concisely and correctly by following the language of the reports. But they may be seen constantly applied in practice by the ablest judges, and their application is now habitually sustained and enforced with remarkable consistency by the leading appellate courts. They are both reasonable and useful ; and, indeed, all that is modern in them is the necessary result of modern changes in the law of evidence and review ; and in those states where, as shown by notes appended to the rules, they are not yet fully adopted, a general progress toward their adoption is clearly traceable in the current of decision.

If this little volume serves to facilitate the prompt and correct disposal of business at the circuit, its principal object will be accomplished.

AUSTIN ABBOTT.

71 Broadway, New York,  
Aug. 15, 1885.

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# BRIEF

ON

## Jury Trial in Civil Actions.

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### I.—APPLICATIONS TO POSTPONE.

[The diversity in laxity and strictness in different Courts in applying these rules, makes it important to notice that they ought to be administered in view of the consideration that the right of trial by jury involves on the one hand the right to a reasonably prompt trial, and on the other hand the right to reasonable opportunity to get one's evidence in Court, and to have his witnesses examined there under oath. Hence has arisen the modern rule, that at least after a first postponement an application for further postponement involves a question of right; and although the grounds are necessarily to some extent discretionary, the exercise of the discretion is generally reviewable at least by the full bench in the same Court, and usually, in case of the inferior State Courts, by the appellate Court.]

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|--|--|
| 1. Absence of the party.                       | 9. Contents.                                 |
| 2. — of counsel.                               | 10. — disclosing materiality.                |
| 3. Absence of witness; neglect to<br>subpoena. | 11. Opposing the motion — presump-<br>tions. |
| 4. — or to take deposition.                    | 12. — counter affidavits.                    |
| 5. — of foreign witness.                       | 13. — admitting the desired facts.           |
| 6. — no opportunity to procure.                | 14. Imposing conditions—costs.               |
| 7. Affidavit may be required.                  | 15. — stipulation against abatement.         |
| 8. Who to make.                                | 16. Remedy for refusal.                      |
- 

1. *Absence of the party.*—Absence of the party himself from the trial, without good cause shown, is not ground for a postponement as matter of right;<sup>1</sup> and it is

not enough to show that he remains away in reliance upon his attorney's advice that the case would not be reached.<sup>1</sup>

<sup>1</sup>Tucker vs. Garner, 25 *Kans.*, 454.  
Pardridge vs. Wing, 75 *Ill.*, 236.

Absence, from sudden illness, has been held to make it error to refuse.

Douglass vs. Blakemore, 12 *Heisk. (Tenn.)*, 564.

*Contra*, where illness was shown only by physician's certificate, without affidavit.

Schnell vs. Rothbath, 71 *Ill.*, 83.

A general allegation that the party's presence was necessary for conference with his counsel during the cause, held not enough to make it error to refuse.

Pate vs. Tait, 72 *Ind.*, 450; s. c., 6 *Weekly Cin. Law Bul.*, 173.

<sup>2</sup>Brock vs. South. & North. Ala. R. R. Co., 65 *Ala.*, 79.  
Brandt vs. McDowell, 52 *Iowa*, 230.

2. — *of counsel*.—Absence of attorney or counsel without good cause shown, is not ground of postponement as matter of right.<sup>1</sup>

*Illness* may make it matter of right, where it is impracticable, with due diligence, to secure other counsel in time.<sup>2</sup>

In the absence of any regulation to the contrary, *actual engagement* of counsel in the trial or argument of a cause in another Court at the same time, is good ground for claiming a postponement;<sup>3</sup> but absence on other engagements is not.<sup>4</sup>

<sup>1</sup>Whitehall vs. Lane, 61 *Ind.*, 93.  
Kern Valley Bank vs. Chester, 55 *Cal.*, 49.

Even though he be new counsel called in for the first time.  
Darley vs. Thomas, 41 *Geo.*, 524.

<sup>2</sup>Rice vs. Melendy, 36 *Iowa*, 166.

So also where counsel was kept away by illness in his family.

Thompson vs. Thornton, 41 *Cal.*, 626.

Otherwise, of a simple case which any one could try without preparation.

Jarvis *vs.* Schacklock, 60 *Ill.*, 378.

<sup>3</sup> Hill *vs.* Clark, 51 *Geo.*, 122 (holding it error to refuse).

Gerlach *vs.* Engelhoffer, 7 *Phil.*, 241.

[*Contra*, holding it discretionary, after several continuances.

Brock *vs.* South. & North. Ala. R.R. Co., 65 *Ala.*, 79.]

In the New York City Circuit the rule is that "No cause on any day calendar will be passed, except where the counsel is actually engaged in a trial of a cause in another court in the city, or in the Court of Appeals; and then only until such an engagement is discharged, or upon proof of the absence of a witness duly subpoenaed."

*N. Y. Rules of 1884. Bliss' ed., by Clement*, 111;

Same rule, *Hun's ed.*, 284.

<sup>4</sup> Jackson *vs.* Wakeman, 2 *Cow.*, 578.

3. *Absence of witness—neglect to subpoena.*—Absence of a witness whom the applicant omitted to subpoena, though in reliance on his promise to attend, does not entitle to a postponement;<sup>1</sup> but the application is discretionary with the trial Court.<sup>2</sup>

<sup>1</sup> Common practice.

Freeland *vs.* Howell, *Anth. N. P.*, 272.

Otherwise, of a foreign witness who could not be subpoenaed because beyond the jurisdiction, but whose promise was properly relied on.

Cahill *vs.* Hilton, 31 *Hun*, 114.

<sup>2</sup> Farmers & Drovers' Bank *vs.* Williamson, 61 *Mo.*, 259.

4. — —, *or to take deposition.*—Nor does absence of a transient witness, whom the applicant had adequate opportunity to examine before trial.

Smith *vs.* Cunningham, 9 *Phil. (Pa.)*, 96.

Campbell *vs.* Blanke, 13 *Kans.*, 62.

McKay *vs.* Marine Ins. Co., 2 *Cai.*, 384.

5. — *of foreign witness.*—Absence of a foreign witness is ground for postponement if there were circum-

stances justifying the reliance of the applicant on his voluntary attendance.<sup>1</sup> Otherwise not.<sup>2</sup>

<sup>1</sup>Cahill *vs.* Hilton, 31 *Hun*, 114 (error to refuse).

Mowat *vs.* Brown, 17 *Fed. R.*, 718.

Brown *vs.* State, 65 *Geo.*, 332.

<sup>2</sup>Campbell *vs.* Blanke, 13 *Kans.*, 62 (witness residing in another county).

6. — *no opportunity to procure.*—Absence of a witness who unexpectedly went abroad so that there was no opportunity to subpoena him, is ground for postponement.<sup>1</sup> So of the unexpected death of a subpoenaed witness, too shortly before the trial to allow of getting other evidence.<sup>2</sup> So may be the absence of documentary evidence, the existence of which was too recently discovered to enable the party to have produced it.<sup>3</sup>

<sup>1</sup>Nixen *vs.* Hallett, 2 *Johns. Cas.*, 218.

<sup>2</sup>Long *vs.* McDonald, 39 *Geo.*, 186 (judgment reversed for refusing postponement).

<sup>3</sup>Cahill *vs.* Dawson, 1 *Fost. & F.*, 291.

Higginson *vs.* Bank of England, *Id.*, 450.

7. *Affidavit may be required.*—Upon an application to postpone a trial the Court may require that the facts stated as the ground of the application be presented by affidavit.

Brooklyn Oil Works *vs.* Brown, 7 *Abb. Pr.*, *N. S.*, 382. A well considered case, where it is said that *the party* may require it.

Tribune Association *vs.* Smith, 40 *Super. Ct. (J. & S.)*, 251.

Thompson *vs.* Miss. Ins. Co., 2 *La.*, 228; *s. c.*, 22 *Am. Dec.*, 129.

But oral statements, if not objected to, are of equivalent effect.

Tribune Association *vs.* Smith (*above*).

8. *Who to make.*—An affidavit by the party may be required, unless sufficient reason for accepting the

affidavit of another person appears.<sup>1</sup> Refusing to accept the attorney's affidavit when inability of the party to make it is shown, is error.<sup>2</sup>

<sup>1</sup> The Court will not receive the affidavit of the attorney's clerk, unless it state that he has the management of the cause and is particularly acquainted with the circumstances.

Sullivan *vs.* Magill, 1 *H. Blackst.*, 637.

<sup>2</sup> Lockhart *vs.* Wolf, 82 *Ill.*, 37 (judgment reversed for this error).

9. *Contents.*—An affidavit to support an application to postpone, on account of absence of evidence,<sup>1</sup> must be to:

(1.) The merits;<sup>2</sup>

(2.) The materiality of the desired evidence;<sup>3</sup>

(3.) Facts showing due diligence already exercised in the endeavor to procure it;<sup>4</sup> and

(4.) Assurance of probable presence of the evidence at the time proposed.<sup>5</sup>

Allegations on information must state the names and residences of the informants.<sup>6</sup>

<sup>1</sup> This rule is generally stated, as it generally occurs, as relating to witnesses; but it applies to documents also.

<sup>2</sup> Brooklyn Oil Works *vs.* Brown, 7 *Abb. Pr.*, *N. S.*, 382.

[Oath to merits not required in England.

Hill *vs.* Prosser, 3 *Dowl. P. C.*, 704.]

<sup>3</sup> *Id.*

People *vs.* Vermilyea, 7 *Cow.*, 369, 384.

Sellers *vs.* Kelly, 45 *Miss.*, 323.

Kern Valley Bank *vs.* Chester, 55 *Cal.*, 49.

Sprague *vs.* Heaps, 7 *Ill. App.*, 447.

Green *vs.* King, 17 *Fla.*, 552.

Omission to name the witness held no objection, in Smith *vs.* Dobson, 2 *Dowl. & R.*, 420, and see Brown *vs.* Murray, 4 *Dowl. & R.*, 832.

*Contra*, State *vs.* Underwood, 76 *Mo.*, 630.



- <sup>4</sup>*Brooklyn Oil Works vs. Brown*, 7 *Abb. Pr.*, N. S., 382.  
*Wolcott vs. Mack*, 53 *Ind.*, 269.  
*Ilett vs. Collins*, 102 *Ill.*, 402.  
*People vs. Vermilyea*, 7 *Cow.*, 369, 384.  
*Labbaite vs. State*, 6 *Tex. App.*, 257.  
*Thomas vs. McCormick*, 1 *New Mexico*, 369.  
*Kern Valley Bank vs. Chester*, 55 *Cal.*, 49.  
*King vs. D'Eon*, 1 *W. Blackst.*, 510; s. c., 3 *Burr.*, 1513.  
*Lillienthal vs. Anderson*, 1 *Idaho, N. S.*, 673.  
*Ingalls vs. Noble*, 14 *Nebr.*, 272.  
*Moon vs. Helfer*, 25 *Kans.*, 139.  
s. p., *Sprague vs. Heaps*, 7 *Ill. App.*, 447.  
*Handline vs. State*, 6 *Tex. App.*, 347.  
*Green vs. King*, 17 *Fla.*, 452.  
*Flournoy vs. Marx*, 33 *Tex.*, 786 (holding a general averment of due diligence not enough).
- <sup>5</sup>*Brooklyn Oil Works vs. Brown*, 7 *Abb. Pr.*, N. S., 382.  
*Brown vs. Moran*, 65 *How. Pr.*, 349.  
s. p., *Sprague vs. Heaps*, 7 *Ill. App.*, 447.
- <sup>6</sup>*Comstock vs. State*, 14 *Neb.*, 205.  
*Thompson vs. Miss. Ins. Co.*, 2 *La.*, 228; s. c., 22 *Am. Dec.*, 129.  
*Labbaite vs. State*, 6 *Tex. App.*, 257.
- In some cases inability to procure another witness instead, is required to be shown.  
*Jarvis vs. Schacklock*, 60 *Ill.*, 378.

10. — *disclosing materiality*.—In stating the materiality of the desired evidence, a general allegation is usually enough on a first application.<sup>1</sup>

But if a postponement has already been had,<sup>2</sup> or if circumstances of suspicion or imputation of laches appear,<sup>3</sup> or if the necessary delay is great,<sup>4</sup> the Court may require that the affidavit state what the desired evidence will prove,<sup>5</sup> and the names and residences of desired witnesses,<sup>6</sup> or disclose the nature of the evidence sufficiently to see that upon fair and probable grounds it will be material.<sup>7</sup>

<sup>1</sup> *People vs. Vermilyea*, 7 *Cow.*, 369, 386.

*Hooker vs. Rogers*, 6 *Cow.*, 577.

*Wicker vs. Boynton*, 83 *Ill.*, 545 (*dictum*).

[*Contra*, *Kern Valley Bank vs. Chester*, 55 *Cal.*, 49.]

An application is deemed to be a first application within this rule if the only previous application proved to have not delayed the cause, by reason of its not having been reached.

*Pulver vs. Hiserodt*, 3 *How. Pr.*, 49.

<sup>2</sup> *Moon vs. Helfer*, 25 *Kans.*, 139.

<sup>3</sup> *People vs. Vermilyea*, 7 *Cow.*, 369, 384.

*Bush vs. Weeks*, 24 *Hun.*, 545 (Justices' Court case).

<sup>4</sup> *Lord vs. Cooke*, 1 *W. Blackst.*, 436.

<sup>5</sup> In *Ogden vs. Payne*, 5 *Cow.*, 15, it was held that the mere fact that the desired witness was the attorney of the party, so that it was possible his testimony might be privileged, was not ground for requiring a disclosure.

<sup>6</sup> *Plett vs. Collins*, 102 *Ill.*, 402.

*Thomas vs. McCormick*, 1 *New Mex.*, 369.

s. p., *Lillienthal vs. Anderson*, 1 *Idaho, N. S.*, 673.

*Vanwey vs. The State*, 41 *Tex.*, 639 (affidavit omitting to state knowledge of residences).

And, according to *Brown vs. Johnson*, 14 *Kans.*, 377, and *Cody vs. Butterfield*, 1 *Col.*, 377, sufficiently to give the adverse party a right to defeat the application by admitting the facts.

The motion should be denied if the desired evidence is inadmissible under the pleadings.

*Cartwright vs. Culver*, 74 *Mo.*, 179.

*Waldo vs. Beckwith*, 1 *New Mex.*, 182.

*Thackaray vs. Hanson*, 1 *Col.*, 365.

And may be denied if the witness is privileged.

*Lavery vs. Crooke*, 52 *Wisc.*, 612; s. c., *South. Law Rev.*, *N. S.*, 592.

11. *Opposing the motion—presumptions.*—It is presumed that the applicant will state the facts as strongly in his own favor as the nature of the case permits, and therefore the Court is not called upon to make presumptions in his favor.

Per OGDEN, J., in *Van Brown vs. The State*, 34 *Tex.*, 186.  
s. p., *Dold vs. Dold*, 1 *New Mex.*, 397.

12. — *counter affidavits.*—The Court may, in its discretion, receive counter affidavits.<sup>1</sup> But evidence to

disprove the facts which the applicant desires opportunity to prove, is inadmissible.<sup>2</sup>

<sup>1</sup>Even a justice of the peace has discretionary power to allow plaintiff to introduce evidence showing that defendant's application for postponement is not made in good faith, and is groundless.

*Weed vs. Lee*, 50 *Barb.*, 354.

Especially where there is suspicion of fraud or imposition.  
*Cushenberry vs. McMurray*, 27 *Kans.*, 328.

But in the *Star Route* case, Dec., 1882, *WYLIE, J.*, refused to do so, saying that a motion for continuance must be decided on the affidavit of the party applying for it.

To the same effect are *Wick vs. Weber*, 64 *Ill.*, 167, and *Quincy Whig Company vs. Tillson*, 67 *id.*, 351, intimating that it is error to receive counter affidavits.

In *Walt vs. Walsh*, 10 *Heisk. (Tenn.)*, 314, the Court declined to pass upon the practice of hearing counter affidavits, but intimated that it is proper for the inferior court to hear enough of the testimony to enable it to pass upon the motion.

<sup>2</sup>*Horn vs. State*, 62 *Geo.*, 362.

13. — *admitting the desired facts.*—Where the applicant discloses what facts he intends to prove by the desired evidence, it is a sufficient answer to the application to admit the truth of those facts.<sup>1</sup>

But the admission must be unqualified.<sup>2</sup> It is not enough to admit that the desired witness would swear to such facts.<sup>3</sup>

*Brill vs. Lord*, 14 *Johns.*, 339 (even under a statute requiring a justice to postpone for such reasonable time as will enable the defendant to procure testimony or witnesses).

*State vs. Plowman*, 28 *Kans.*, 569.

*Kitchens vs. Hutchins*, 44 *Geo.*, 620 (*Geo. Code*, § 3472).

*s. P., Calhoun vs. Mechanics, etc., Bank*, 28 *La. Ann.*, 260.

*Brown vs. Johnson*, 14 *Kans.*, 377.

*Green vs. King*, 17 *Fla.*, 452.

So also even where the desired witness was the party himself on whose behalf the application was made.

*Pate vs. Tait*, 72 *Ind.*, 450; s. c., 6 *Weekly Cin. L. B.*, 173.

*Pruyn vs. Gibbens*, 24 *La. Ann.*, 231.

<sup>2</sup> *Nave vs. Horton*, 9 *Ind.*, 563.

*Cheney vs. Smith*, 42 *Geo.*, 50 (*Geo. Code*, § 3479).

*Klugman vs. Gammell*, 43 *id.*, 581.

*Smith vs. Creason*, 5 *Dana (Ky.)*, 298; s. c., 30 *Am. Dec.*, 688.

<sup>3</sup> *People vs. Vermilyea*, 7 *Cow.*, 369, 388, 389, 400.

s. p., *Pate vs. Tait*, 72 *Ind.*, 450; s. c., 6 *Weekly Cin. L. B.*, 173.

14. *Imposing conditions; costs.*—The Court may impose payment of costs and disbursements as a condition<sup>1</sup>

Unless otherwise directed such payment is to be made *instantly*,<sup>2</sup> and without awaiting formal demand.<sup>3</sup>

<sup>1</sup> *N. Y. Code Civ. Pro.*, § 3255.

In the absence of special cause for other conditions this is all that should be required.

*Hall vs. Dwinell*, 10 *Wend.*, 628.

In N. Y. the costs cannot exceed \$10, besides disbursements.

*Noxon vs. Bentley*, 6 *How. Pr.*, 418.

*Jackson vs. McBurney, id.*, 408.

Unless leave to amend is granted.

<sup>2</sup> *Jackson vs. Pell*, 19 *Johns.*, 270.

*Bulkeley vs. Keteltas*, 2 *Sandf.*, 734.

<sup>3</sup> *Jackson vs. Pell (above)*.

15. — — *stipulation against abatement.*—On grant-  
ing an application made on behalf of a party danger-  
ously ill, the Court may require a stipulation that death  
before final judgment shall not abate the action.<sup>1</sup>

The attorney has power to bind his client by such a  
stipulation.<sup>2</sup>

<sup>1</sup> *Ames vs. Webbers*, 10 *Wend.*, 576.

<sup>2</sup> *Cox vs. N. Y. Central, etc., R. R. Co.*, 68 *N. Y.*, 414; rev'g  
4 *Hun*, 176; s. c., 6 *Supm. Ct. (T. & C.)*, 445.

It was there conceded that counsel have the same power as the attorney of record. But in *Nightingale vs. Oregon Central R. R. Co.* (U. S. Circ. Ct., Oreg., 1873), 17 *Id. Rev. Rec.*, 61, repeated at p. 93, DEADY, J., grants plaintiff's motion to set aside an order for continuance on the ground that it was entered on a stipulation signed by counsel only; he being of opinion that only the attorney of record could sign such a stipulation, and that neither counsel, even though interested in the cause of action, nor the client himself, having an attorney of record, could do so.

The true rule is, that counsel having sufficient authority to appear for the trial of the cause (and an application to postpone is part of the trial) have, at least in the absence of the attorney of record, and equally in his presence and without his dissent, authority to bind the client by acceding to any condition the Court have power to impose.

16. *Remedy for refusal.*—An exception lies to the refusal of an application to postpone,<sup>1</sup> if made before going on with the trial;<sup>2</sup> and the affidavits may be made part of the record.<sup>3</sup>

<sup>1</sup> *Howard vs. Freeman*, 3 *Abb. Pr.*, N. S., 292; s. c., 7 *Robt.*, 25.

*Gallandet vs. Steinmetz*, 6 *Abb. N. C.*, 224; s. c. less fully, 45 *Super. Ct. (J. & S.)*, 239.

*Gregg vs. Howe*, 37 *id.*, 420.

s. p., *Lillienthal vs. Anderson*, 1 *Idaho, N. S.*, 673

*Johnson vs. Dinsmore*, 11 *Nebr.*, 391.

In the Supreme Court of the United States the contrary is held, the decision of the Court below being regarded as discretionary, and not reviewable in error.

*Woods vs. Young*, 4 *Cranch*, 237.

*Barrow vs. Hill*, 13 *How. (U. S.)*, 54.

*Thompson vs. Selden*, 20 *id.*, 194.

*Contra*, also *Wooldridge vs. State*, 13 *Tex. App.*, 443

<sup>2</sup> A motion to suspend the trial to enable the applicant to obtain testimony is addressed to the discretion of the Court.

*Rapelye vs. Prince*, 4 *Hill*, 119; s. c., 40 *Am. Dec.*, 267. So held even where defendant wished to call plaintiff.

s. p., *Holbrook vs. Wilson*, 4 *Bosw.*, 64, 72.

<sup>3</sup>Howard *vs.* Freeman, 3 *Abb. Pr., N. S.*, 292; s. c., 7 *Robt.*, 25.

Giraudat *vs.* Korn, 8 *Daly*, 406.

Granting or refusing a continuance rests in sound discretion, and the appellate Court will only interfere in the cases of unreasonable discretion.

Lillienthal *vs.* Anderson, 1 *Idaho*, 673.

## II.—IMPANELLING JURY.

[The statutes abrogating resort to triers, and leaving it to the Judge to determine all causes of challenge, do not, without more, abrogate the distinction between challenges for principal cause and challenges to the favor. In the former class, if the fact suggested be established, incompetency is an inevitable conclusion of law; in the latter incompetency is a mere question of fact.

The application of the following rules should be guided by the recognized principles that, in the absence of statute to the contrary: (1) a Court of general jurisdiction, finding the statutory means of providing a jury inadequate, may fall back on its common law powers; (2) that an unfit juror may be set aside on a just objection, though the statute do not provide for the case; and (3) that the judge may properly interpose of his own motion, when necessary to secure a fit and impartial jury.]

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|------------------------------------|---|
| 1. The right to challenge.         | 12. — opinion as to incidental question.  |
| 2. Interrogating the jurors.       | 13. — prejudice.                          |
| 3. Evidence <i>aliunde</i> .       | 14. — litigation.                         |
| 4. Exception.                      | 15. Time for challenging.                 |
| 5. Grounds of challenge: Interest. | 16. Trial, evidence and decision.         |
| 6. — citizen of municipality.      | 17. Exception.                            |
| 7. — relationship.                 | 18. Peremptory challenge—when interposed. |
| 8. — dependence—of juror on party. | 19. — the same.                           |
| 9. — — of party on juror.          | 20. — number of.                          |
| 10. — acquaintance.                | 21. Court may set aside juror.            |
| 11. — opinion.                     |   |

1. *The right to challenge.*—The right to challenge jurors for a cause assigned, as distinguished from peremptory challenge, is a common law right, which cannot be taken away except by express statute.

Barrett *vs.* Long, 3 *Ho. of L. Cas.*, 395, 415.

2. *Interrogating the jurors.*—Each party has the right, before the jury is sworn, to interrogate each proposed juror under oath, or have the Court do so, on points material to the question whether he has the qualifications required by law, and is impartial.<sup>1</sup>

But questions tending to his disgrace<sup>2</sup> or disadvantage<sup>3</sup> cannot be asked the juror.

<sup>1</sup> *Hull vs. Albro*, 2 *Disney (Ohio)*, 147, 149.

*Lœffler vs. Keokuk, etc., Packet Co.*, 7 *Mo. App.*, 185, 189.

*Gilliam vs. Brown*, 43 *Miss.*, 641.

Other cases in 23 *Am. Dec.*, 131, note.

*Contra*, in *So. Car. State vs. Crank*, 2 *Bailey*, 66; s. c., 23 *Am. Dec.*, 117.

This right extends to facts not in themselves disqualifying, if in connection with others they might show bias.

*Mechanics' & Farm. Bk. vs. Smith*, 19 *Johns.*, 115.

It is for the Court to say what evidence is admissible on the question of impartiality.

*Smith vs. Floyd*, 18 *Barb.*, 522.

Interrogating as to general opinions of a juror's duties was held not allowed even for the purpose of ascertaining if the juror is "of sound judgment and well informed" as required by the statute in *Pennsylvania Co. vs. Rudel*, 100 *Ill.*, 603.

<sup>2</sup> *Burt vs. Panjaud*, 99 *U. S. (9 Otto)*, 180, 181.

*Mechanics' & Farm. Bk. vs. Smith*, 19 *Johns.*, 115.

*People vs. Fuller*, 2 *Park. Cr.*, 16.

<sup>3</sup> *Blackst. Com.*, 363.

3. *Evidence aliunde.*—A witness may be called to prove the ground of challenge.

*Pringle vs. Huse*, 1 *Cow.*, 432.

s. p., *Burt vs. Panjaud*, 99 *U. S. (9 Otto)*, 180.

4. *Exception.*—An exception lies to the admission or exclusion of evidence under either of the two preceding rules.

5. *Grounds of challenge; Interest.*—An interest in the result of the action disqualifies.<sup>1</sup> Membership in a

corporation which is a party is an interest within this rule.<sup>2</sup>

At common law this is ground of a challenge for principal cause.

<sup>1</sup> Wood *vs.* Stoddard, 2 *Johns.*, 194.

Melson *vs.* Dickson, 63 *Geo.*, 682; s. c., 36 *Am. R.*, 128.

But not an interest merely in the legal questions involved, without an interest in the result of the cause. See *Williams vs. Smith*, 6 *Cow.*, 166; *Miller vs. The Wild Cat Gravel Road Co.*, 52 *Ind.*, 51, 59. But compare *Lewis vs. Few*, *Anth. N. P.*, 102; where it was properly held that a person present and acting at a political meeting was not competent as juror in an action between other persons for a libel contained in an address adopted at the meeting. And *Lewis vs. Jefferson Co.*, 20 *Fla.*, 980; abstr. s. c., 19 *Cent. L. J.*, 136, where a holder of similar county bonds to those sued on was held disqualified.

It is not necessary to show a pecuniary interest; for a trustee of a charitable society, serving without compensation and having no possible pecuniary benefit from its recovery in the action, would be incompetent.

<sup>2</sup> Even where, as in a religious corporation, the membership is only the beneficial interest of one of the denomination in the administration of the trust represented by the trustees.

*Cleage vs. Hyden*, 6 *Heisk. (Tenn.)*, 73. Judgment reversed for error in refusing to exclude members of the Methodist Episcopal Church, South, in action by the plaintiffs as trustees of that church.

This is on account of interest, not religious opinion; for that does not disqualify, (*ib.*) unless amounting or leading to bias in the particular case. But the fact that the juror is a fellow-member with a party, in a corporation or society,—as for instance, the masons—is only ground for challenge to the favor, that is it raises only a question of actual bias in the particular case.

*Purple vs. Horton*, 13 *Wend.*, 9, 23.

Membership in a corporation does not disqualify in an action to which the corporation is not a party, merely because a servant of the corporation is the defendant, if the case be such that there could be no benefit to or recovery over against the corporation.

*Williams vs. Smith*, 6 *Cow.*, 166.



6. — *citizen of municipality*.—At common law, and also under statutes declaring interest a disqualification, a citizen and tax-payer in a town, city or other municipality, is disqualified in an action in which it is a party,<sup>1</sup> unless it is otherwise provided by statute.<sup>2</sup>

At common law this is a ground of challenge for principal cause. If the relation exists the disqualification is absolute.

<sup>1</sup> *England*—Day vs. Savadge, *Hobart* 85\* (*Am. ed.*, 212).

*Connecticut*—Bailey vs. Trumbull, 31 *Conn.*, 581, 583 (*dictum*).

*Georgia*—Mayor of Columbus vs. Goetchius, 7 *Geo.*, 139.

*Illinois*—Russell vs. Hamilton, 3 *Ill.*, 56, where an officer was the nominal party suing for benefit of township.

*Indiana*—Hearn vs. City of Greensburgh, 51 *Ind.*, 119.

*Iowa*—Cramer vs. City of Burlington, 42 *Iowa*, 315, 318.

*Kansas*—Gibson vs. Wyandotte, 20 *Kans.*, 156.

*Massachusetts*—Hawes vs. Gustin, 2 *Allen*, 402.

*Missouri*—Eberle vs. Board of St. Louis, 11 *Mo.*, 247.

*Fine vs. St. Louis*, 30 *id.*, 166, 173.

*Nebraska*—City of Omaha vs. Cane, 15 *Nebr.* 657.

*New Jersey*—Peck vs. Essex, 1 *Zab.*, 656.

*New York*—Diveny vs. City of Elmira, 51 *N. Y.*, 506; Wood vs. Stoddard, 2 *Johns.*, 194, *Code Civ. Pro.*, § 1179.

In the City of New York, which is co-extensive with the county, the objection is waived or ignored from necessity.

*Rhode Island*—Watson vs. Tripp, 11 *R. I.*, 98.

*Tennessee*—Cleage vs. Hyden, 6 *Heisk. (Tenn.)*, 73.

*Kentucky*—(*contra*) Kemper vs. Louisville, 14 *Bush*, 87.

<sup>2</sup> General statutes in various jurisdictions, as well as special charter provisions, create numerous peculiar exceptions to this rule. Thus, in the State of New York, liability to pay taxes in a city, county or town, does not disqualify in a *penal* action.

*N. Y. Code Civ. Pro.*, § 1179.

Residence does not disqualify in an action in which a county is *interested*.

*N. Y. R. S.*, 384, § 4.

Nor in an action in which a town is *interested*, unless the proceeding is by or against the town.

*Id.*, 357, § 4.

Nor does residence or liability to taxation in a village incorporated under the general act.

*N. Y. L.* 1870, c. 291, tit. viii., §§ 9, 28; same stat., 2 *R. S.*, 7 ed., 904.

*N. Y. Code Civ. Pro.*, § 1179.

7. — *relationship*.—Relationship by consanguinity or affinity<sup>1</sup> to a party, or to one who is disqualified by interest direct or indirect,<sup>2</sup> disqualifies.

At common law this disqualification extends to those in the ninth degree,<sup>3</sup> and no further. By statute in New York it extends to the sixth.<sup>4</sup>

At common law this is ground of challenge for principal cause.

<sup>1</sup>The affinity must be one subsisting at the time. If, upon a death in the line, issue do not survive, the affinity is severed.

*Cain vs. Ingham*, 7 *Cow.*, 478, and note.

After which it is only a circumstance to be considered on the question of actual bias as a ground of challenge to the favor.

<sup>2</sup>Thus relationship to counsel or attorney, whose fees depend on a recovery, disqualifies equally as relationship to a party.

*Melson vs. Dickson*, 36 *Am. R.*, 128; s. c., 63 *Geo.*, 682.

So of the relationship of a juror as son of a stockholder in a corporation party.

*Georgia R. R. Co. vs. Hart*, 60 *Geo.*, 550.

So, it seems, of relationship to an inhabitant of a city or town which is a party.

*Day vs. Savadge*, *Hobart*, 85\* (*Am. ed.*, 212).

*Bailey vs. Trumbull*, 31 *Conn.*, 581, 583 (*dicta*).

<sup>33</sup> *Blackst. Com.*, 363.

Recognized in *Wirebach vs. Eastern Bank*, 97 *Penn. St.*, 543, 552.

And in *Cain vs. Ingham*, 7 *Cow.*, 478.

Coke speaks of relationship without limit as to degree.

<sup>4</sup> *N. Y. Code Civ. Pro.*, § 1166.

The degree is ascertained by ascending from the juror to the common ancestor, and descending to the party, counting a degree for each person in both lines, including the juror and party and excluding the common ancestor.

*N. Y. Code Civ. Pro.*, § 46.

8. — *dependence — of juror on party.*—One who is subject to the control<sup>1</sup> of a party,<sup>2</sup> as for instance an employee,<sup>3</sup> or a tenant,<sup>4</sup> is disqualified, without evidence of bias.

At common law this is ground of challenge for principal cause.

<sup>1</sup>This is the test in this class of cases. Thus being a guest in an inn, for pay, or not shown to be gratuitously so, is not cause for principal challenge, because not a case of a position where one might be subject to control.

*Cummings vs. Gann*, 52 *Penn. St.*, 484.

<sup>2</sup>On general principles one subject to control of a person interested should be deemed equally disqualified.

<sup>3</sup>*Hubbard vs. Rutledge*, 57 *Miss.*, 7.

*Central R. R. Co. vs. Mitchell*, 63 *Geo.*, 173, holding that at common law all servants are disqualified.

<sup>4</sup>*Hathaway vs. Helmer*, 25 *Barb.*, 29.

And the abolition of distress for rent has not changed the rule. *Ib.*

9. — — *of party on juror.*—One who possesses like means of control over a party, as, for instance, his landlord, is not absolutely disqualified; but the circumstance is to be considered on the question of whether there is bias as matter of fact.

At common law this is ground of challenge to the favor only.

*People vs. Bodine*, 1 *Den.*, 281, 306.

10. — *acquaintance.*—Intimate acquaintance<sup>1</sup> with a party, or fellow-service in employment,<sup>2</sup> does not disqualify, but is a circumstance to be considered on the question of bias.

At common law this is a ground of challenge to the favor only.

<sup>1</sup>*Moore vs. Cass*, 10 *Kans.*, 288.

<sup>2</sup>*People vs. Bodine*, 1 *Den.*, 281, 306.

11. — *opinion*.—An opinion upon the merits of the case, previously formed or expressed, disqualifies, if it is positive and not merely hypothetical, and would require evidence to remove.

At common law this is ground of challenge for principal cause.<sup>1</sup>

An opinion does not disqualify if the juror testifies that he believes he can render an impartial verdict, according to the evidence, and that his previously formed opinion or impression will not bias or influence his verdict, and the Court is satisfied that he does not entertain such a present opinion or impression as will influence his verdict.<sup>2</sup>

If his testimony is not clear to this effect he should be excluded.

<sup>1</sup>See *Greenfield vs. People*, 6 *Abb. N. C.*, 1, and note.

<sup>2</sup>This is the modern rule, sanctioned by the decisions in civil cases and established in New York, even in criminal cases, by statute (*L.* 1872, c. 475; same stat., *N. Y. Code Crim. Pro.*, § 376), and in substance applied in other States, though not fully recognized in all. The principles involved are most frequently discussed in criminal cases.

The most recent case on the N. Y. Statute is *People vs. Casey*, 96 *N. Y.*, 115; s. c., 2 *N. Y. Crim. R.*, 194 (rev'g *id.*, 187 and 31 *Hun.*, 158).

To similar effect are :

*Gold Mining Co. vs. National Bank*, 96 *U. S.* (6 *Otto*), 640.

*Rogers vs. Rogers*, 14 *Wend.*, 132.

*Jackson vs. Commonwealth*, 23 *Gratt. (Va.)*, 919.

*Freeman vs. People*, 4 *Den.*, 9.

*Lowenberg vs. People*, 5 *Park. Cr.*, 414.

*Sanchez vs. People*, 22 *N. Y.*, 147.

*Scranton vs. Stewart*, 52 *Ind.*, 68.

*Lycoming Fire Ins. Co. vs. Ward*, 90 *Ill.*, 545, 547.

*Smith vs. Eames*, 3 *Scam.*, 76.

*Union Gold Mining Co. vs. Rocky Mountain National Bank*, 2 *Col.*, 565, 577.

*Conway vs. Clinton*, 1 *Utah*, 215.

*Denver, S. P., etc., R. R. Co. vs. Moynahan (Col., 1884)*, 5 *Pac. Rep.*, 811.

12. — *opinion as to incidental question*.—An abstract opinion as to a question incidentally involved does not disqualify, unless found to be such as to be likely to influence the verdict.<sup>2</sup>

<sup>1</sup>For instance, in a life insurance case, the question whether suicide is evidence of insanity.

Compare *Hagadorn vs. Mut. Life Ins. Co.*, 22 *Hun*, 24 and *Boileau vs. Life Ins. Co.*, 9 *Phil. (Pa.)*, 218.

Or in an action for willfully, fraudulently and corruptly refusing a vote, an opinion as to the duty to receive vote.

*Elbin vs. Wilson*, 33 *Md.*, 135, 143.

<sup>2</sup>*Dew vs. McDivitt*, 31 *Ohio St.*, 139, 142.

*Hughes vs. Cairo*, 92 *Ill.*, 339.

*Davis vs. Walker*, 60 *id.*, 452.

13. — *prejudice*.—Prejudice against the business calling in connection with which the cause of action arises, disqualifies if found to be such as to be likely to influence the verdict;<sup>1</sup> otherwise not.<sup>2</sup>

At common law this is ground for challenge to the favor only.

<sup>1</sup>*Winnesheik Ins. Co. vs. Schueller*, 60 *Ill.*, 465.

*Robinson vs. Randall*, 82 *id.*, 521.

*Albrecht vs. Walker*, 73 *id.*, 69.

s. p., *U. S. vs. Borger*, 7 *Fed. Rep.*, 193 (*crim. case*).

<sup>2</sup>*Maretzek vs. Cauldwell*, 5 *Robt.*, 660; s. c., 2 *Abb. Pr. N. S.*, 407.

14. — *litigation*.—Litigation between a party and a juror disqualifies absolutely, if an action implying ill-will, malice, or revenge,—such as assault, slander, etc.—is pending; otherwise it does not disqualify, unless found to be likely to influence the verdict.

At common law the former is ground for challenge for principal cause; the latter for challenge to the favor only.

*People vs. Rodine*, 1 *Den.*, 281, 305.

Having a cause of action against the defendant, upon the same state of facts, is enough to disqualify.

*Davis vs. Allen*, 11 *Pick.*, 466 ; s. c., 22 *Am. Dec.*, 386.

“There is abundant latitude for selection; none should sit who are not entirely impartial” (SHAW, Ch. J.).

15. *Time for challenging.*—Either party may be allowed to challenge a juror for cause at any time before he has been sworn as a juror.

*Edelen vs. Gough*, 8 *Gill*, 87, 89.

*Scripps vs. Reilly*, 38 *Mich.*, 10.

In the latter case, MARSTON, J., says:

“Whether counsel for the different parties have exhausted their peremptory challenges, and announced themselves satisfied with the jury or not, they have undoubtedly the right, certainly up to the time when the jury is sworn, to make further challenge for cause. It is the aim and policy of the law to have a fair and impartial jury, and to this end it would be the clear duty of the Court up to the last minute, to permit counsel to further examine the jurors.”

*Scripps vs. Reilly*, 38 *Mich.*, 10, 13.

*People vs. Damon*, 13 *Wend.*, 351, lays down the broader, but very just rule, that the Court may allow necessary challenges to secure an impartial jury, at any time before testimony has been taken.

16. *Trial, evidence and decision.*—A challenge, whether for principal cause or to the favor, is now triable only by the judge.<sup>1</sup>

At common law, it may be tried by the judge if no objection be made;<sup>2</sup> but if the judge or a party object, a question of fact raised by either kind of challenge is to be tried by triers.

On a question of actual bias, even slight evidence is admissible.<sup>3</sup> The object of inquiry is the state of mind of the proposed juror; and that state must be such, in order to make him competent, as will lead to the inference that he will act with entire impartiality.<sup>4</sup>

<sup>1</sup>This is now the common practice, and prescribed in N. Y. by *Code Civ. Pro.*, § 1180.

<sup>2</sup> *People vs. Mather*, 4 *Wend.*, 229; s. c., 21 *Am. Dec.*, 12.

<sup>3</sup> *People vs. Bodine*, 1 *Den.*, 281, 307.

<sup>4</sup> *May vs. Elam*, 27 *Iowa*, 365 (DILLON, J.).

17. *Exception*.—An exception lies to the erroneous overruling of an objection or challenge, but it may be unavailing if the party does not finally exhaust his peremptory challenges.<sup>1</sup>

<sup>1</sup> *Robinson vs. Randall*, 82 *Ill.*, 521 (DICKEY, J., dissenting, being of opinion that the not exhausting the peremptory challenges did not render the error harmless).

*Sullings vs. Shakespeare*, 46 *Mich.*, 408.

*Whittaker vs. Carter*, 4 *Ired. (N. C.)*, 461; s. p., *Burt vs. Panjaud*, 99 *U. S. (9 Otto)*, 180; *Eckert vs. St. Louis Transfer Co.*, 2 *Mo. App.*, 36; and *Conway vs. Clinton*, 1 *Utah*, 215; where, however, the objectionable juror had been excluded by other challenges.

18. *Peremptory challenge — when interposed*.—A party has a right to reserve his peremptory challenge until the number of twelve is full, after objections and challenges for cause have been disposed of.

*Sterling Bridge Co. vs. Pearl*, 80 *Ill.*, 251, 254.

*Taylor vs. Western Pacific R. R. Co.*, 45 *Cal.*, 323.

The head-note in the latter case is as follows:

In a civil action a party is not bound to exercise his right of peremptory challenge to jurors, until there are in the jury box twelve persons whom the Court has adjudged to be competent jurors.

*Taylor vs. Western Pacific R. R. Co.*, 45 *Cal.*, 323.

Judgment was reversed for error in requiring a party to do so.

The reason is that unless a party has ascertained what jurors can be excluded for cause, and therefore need not be challenged peremptorily, he may lose the chief value of this privilege.

*Hunter vs. Parsons*, 22 *Mich.*, 96; citing 4 *Bl. Com.*, 353.

*People vs. Bodine*, 1 *Den.*, 281.

To the same effect is *Taylor vs. Western Pac. R. R. Co.*, 45 *Cal.*, 323.

The statutes in some States are held to impose a different rule.

19. — *the same.*—A peremptory challenge is not too late at any time before the juror is sworn, unless there is reason to doubt its good faith.

*Hunter vs. Parsons*, 22 *Mich.*, 96.

*s. r.*, *Adams vs. Olive*, 48 *Ala.*, 551.

Although ordinarily the Court should be satisfied of the good faith of an application to withdraw approval and challenge peremptorily instead, yet where an adjournment has intervened so that the jury may have been influenced, the right of peremptory challenge exists at the time of swearing the jury, and it is error to refuse to allow it.

*Spencer vs. De France*, 3 *Greene (Iowa)*, 216.

Especially if after approving the jury as it stood a vacancy was made and a new juror called.

*U. S. vs. Daubner*, 17 *Fed. Rep.*, 793, 797.

20. — *number of.*—The number of peremptory challenges depends on the statute of the jurisdiction.<sup>1</sup>

Where several defendants unite in pleading and appear by the same counsel, they are entitled to but one set of peremptory challenges.<sup>2</sup> If they plead separately and appear by different counsel with defenses on which the verdict may be for one and against another, they are each entitled to the statute number.<sup>3</sup>

<sup>1</sup>The N. Y. Statute allows two to each party.

*Code Civ. Pro.*, §1176.

The U. S. Statute three.

*U. S. R. S.*, §819.

*U. S. vs. Daubner*, 17 *Fed. Rep.*, 793, 797.

<sup>2</sup>*Stone vs. Segur*, 93 *Mass.*, 568.

*Bibb vs. Reid*, 3 *Ala.*, 88.

*Stroh vs. Hinchman*, 37 *Mich.*, 490.

<sup>3</sup>*Stroh vs. Hinchman (above)* (COOLEY, J.).

Compare *Sodousky vs. McGee*, 4 *J. J. Marsh.*, 267, 269.

[*Contra* in the United States Courts.

*U. S. R. S.*, §819.]

21. *Court may set aside juror.*—The Court has power, before testimony has been taken, to set aside a



juror irrespective of whether he has been challenged and so doing is not error if an impartial jury is had,<sup>2</sup> and the objection did not exhaust the objector's peremptory challenges.<sup>3</sup>

<sup>1</sup> Gilliam *vs.* Brown, 43 *Miss.*, 641, 652, and *cas. cit.*

It is the duty of the Court to watch over the empanelling of a jury, so as to preserve its impartiality and purity.  
*Ib.*

s. P., U. S. *vs.* Reed, 2 *Blatchf.*, 435, 450.

Torrent *vs.* Yager, 52 *Mich.*, 506; s. c., 18 *North Rep.*, 239.

The better opinion is that this power may be exercised any time before testimony has been taken.

See *People vs. Damon*, 13 *Wend.*, 351.

*Silsby vs. Foote*, 14 *How. (U. S.)*, 218.

<sup>2</sup> *Atlas Mining Co. vs. Johnston*, 23 *Mich.*, 36, 40.

<sup>3</sup> *Atchison, Topeka, etc., R. R. Co. vs. Franklin*, 23 *Kans.*, 74.  
Citing *People vs. Ferris*, 1 *Abb. Pr., N. S.*, 193.

### III.—MOTIONS ON THE PLEADINGS.

- |   |   |
|---|---|
| 1. Defendant's motion to dismiss complaint for insufficiency. | 7. Defendant's motion to dismiss by cause of admitted defense.  |
| 2. — several defendants.                                      | 8. Plaintiff's motion for judgment for insufficiency of answer. |
| 3. — specifying the ground.                                   | 9. Motion to compel election.                                   |
| 4. — exception to ruling.                                     | 10. Misjoinder.   |
| 5. — amending to defeat the motion.                           | 11. Assessing damages.  |
| 6. — motion, when to be made.                                 |   |

1. *Defendant's motion to dismiss complaint for insufficiency.*—The objection that the complaint does not state facts sufficient to constitute a cause of action is not waived by going to trial without raising it by answer or demurrer, but it may be taken by motion at the trial.<sup>1</sup> So of the objection that the Court has no jurisdiction of the subject of the action.

For the purposes of the motion, the allegations of the complaint are to be deemed true, as on demurrer.<sup>2</sup>

- <sup>1</sup>*Tooker vs. Arnoux*, 76 *N. Y.*, 397, and cases cit.  
*Mosselman vs. Caen*, 4 *Supm. Ct. (T. & C.)*, 171; s. c., 1 *Hun*, 647.  
*Ludjington vs. Taft*, 10 *Barb.*, 447.  
*Stannard vs. Eytinge*, 5 *Robt.*, 90; s. c., 3 *Abb. Pr. (N. S.)*, 42; 33 *How. Pr.*, 262.  
*Baxter vs. Winooski Turnpike Co.*, 22 *Vt.*, 114; s. c., 52 *Am. Dec.*, 84, 89.

An allegation of the conclusion of law which the omitted fact was essential to make out was held not enough to sustain the complaint against such a motion, in *Sheridan vs. Jackson*, 72 *N. Y.*, 170.

- <sup>2</sup>*Sheridan vs. Jackson*, 72 *N. Y.*, 170, aff'g 10 *Hun*, 89. And it will be so treated on appeal, if plaintiff excepts to a dismissal instead of amending. *Ib.* Whether the motion can be denied because the answer contains the matter which the defendant objects has not been alleged, is disputed. Compare *Miller vs. White*, 4 *Hun*, 62; s. c., 6 *Supm. Ct. (T. & C.)*, 255, and *Leon vs. Bernheimer*, 10 *Weekly Dig.*, 288, on the one hand; and *Smith vs. Van Ostrand*, 64 *N. Y.*, 278, 280, and *Russell vs. Mayor, etc.*, of *N. Y.*, 1 *Daly*, 263, on the other.

2. — *several defendants.*—If the action is against more than one defendant the objection may be made on behalf any one or more of them as to whom sufficient facts are not stated, and the complaint dismissed as to him or them.

*Montgomery County Bank vs. Albany City Bank*, 7 *N. Y.*, 459.

3. — *specifying the ground.*—The motion should specify the defect with sufficient clearness to enable plaintiff to amend.

- See *Higgins vs. Newtown, etc.*, R. R. Co., 66 *N. Y.*, 604; aff'g 3 *Hun*, 611.  
*Robbins vs. Woolcott*, 66 *Barb.*, 63.  
*Rector vs. Clark*, 78 *N. Y.*, 21; rev'g 12 *Hun*, 189.

4. — *exception to ruling.*—The granting of the motion when the complaint is bad and the motion is seasonably made and amendment is not made, is not matter of discretion, but of legal right.<sup>1</sup> But if the defect is one proper for amendment, subsequent proof of the omitted facts cures error in denying the motion to dismiss.<sup>2</sup>

<sup>1</sup> *Tooker vs. Arnoux*, 76 N. Y., 397.

And see *Clift vs. Rodger*, 25 Hun, 39, 43.

Compare, however, *Clark vs. Crego*, 51 N. Y., 646 aff'g 47 Barb., 599.

<sup>2</sup> *Lounsbury vs. Purdy*, 18 N. Y., 515.

*Morton vs. Pinckney*, 8 Bosw., 135.

5. — *amending to defeat the motion.*—The Court has power to allow the defect to be supplied by amendment to defeat the motion,<sup>1</sup> if the amendment does not substantially change the cause of action,<sup>2</sup> nor make the case one requiring a different mode of trial.<sup>3</sup> But defendant should be allowed to amend also to meet the new allegations,<sup>4</sup> and to have an adjournment if surprised.

<sup>1</sup> *Woolsey vs. Trustees of Rondout*, 4 Abb. Ct. App. Dec., 639.

*Simmons vs. Lyons*, 55 N. Y., 671 ; aff'g 35 Super. Ct. (J. & S.), 554.

*Bauman vs. Bean* (Mich., 1885), 23 Northw. Rep. 451 (with disapproval of the practice of dismissing on the pleadings when no demurrer was taken COOLEY, J.).

<sup>2</sup> Same cases.

<sup>3</sup> *Bockes vs. Lansing*, 74 N. Y., 437 ; aff'g 13 Hun, 38.

*Stevens vs. Mayor, etc.*, of N. Y., 84 N. Y., 296.

<sup>4</sup> See *Union Bank vs. Mott*, 11 Abb. Pr., 42.

6. — *motion, when to be made.*—The appropriate time for a motion to dismiss the complaint for insufficiency is before the case is opened or before evidence adduced; but the Court may entertain such a motion at any stage of the case<sup>1</sup> before evidence supplying the defect is heard.<sup>2</sup> If the motion to dismiss is not made until after the evidence is in, it should not be granted merely for insuffi-

ney of the complaint, if the cause of action is proved and defendant has not been surprised or prejudiced.<sup>3</sup>

<sup>1</sup> *Scofield vs. Whitelegge*, 49 *N. Y.*, 259; s. c., 12 *Abb. Pr.*, *N. S.*, 320; aff'g 10 *id.*, 104.

<sup>2</sup> *Perkins vs. Giles*, 53 *Barb.*, 342. The reason is the Court is not bound to try an action where no cause is alleged. The motion was made (and sustained on appeal) in *Sheridan vs. Jackson*, 72 *N. Y.*, 170, after admissions of fact had been made by plaintiff (10 *Hun*, 89, 90); and in *Smith vs. Van Ostrand*, 64 *N. Y.*, 278, after some evidence had been given under the complaint, but none under the answer.

<sup>3</sup> *Miller vs. White*, 8 *Abb. Pr.*, *N. S.*, 46; s. c., less fully, 57 *Barb.*, 504 (rev'd, on another ground, in 50 *N. Y.*, 137).

*Rector vs. Clark*, 78 *N. Y.*, 21; rev'g 12 *Hun*, 189.

7. *Defendant's motion to dismiss because of admitted defense.*—The Court may entertain a motion at the trial for dismissal of the complaint on the ground that a defense is admitted on the pleadings.

Plaintiff is not confined to a special motion before trial for judgment.

*Bridge vs. Payson*, 5 *Sandf.*, 210.

Even if the admission claimed is inferred from the ambiguity or informality of an allegation or denial.

*Clark vs. Dillon*, 15 *Abb. N. C.*, 265; *Millville Mfg. Co. vs. Salter*, *id.*, 305.

[*Contra*, *Green vs. Raymond*, 14 *Weekly Dig.*, 322.]

8. *Plaintiff's motion for judgment for insufficiency of answer.*—If defendant has not in his answer denied either of the allegations in the complaint, and has not alleged new matter sufficient to constitute a defense, the plaintiff, if a cause of action is sufficiently alleged in his complaint, is *prima facie* entitled to recover without giving evidence of the truth of his allegations.

*Bacon vs. Cropsey*, 7 *N. Y.*, 195.

*Eaton vs. Wells*, 82 *N. Y.*, 576; aff'g 22 *Hun*, 123.

*United States vs. Dashiell*, 4 *Wall.*, 182, 185.

Whatever the system of pleading may be, it can hardly justify or require the Court to give an instruction contrary to law. NELSON, J., *ib.*

And see *Grocers' Bank vs. Murphy*, 9 *Daly*, 510, *as cas. cit.*

9. *Motion to compel election.*—If incompatible causes of action or defenses<sup>1</sup> are stated in the same pleading, the Court may, at the trial,<sup>2</sup> compel the party to elect between them.

But an objection to the restating of the same contract or grievance in different forms or under different aspects cannot avail to exclude evidence at the trial.<sup>3</sup>

<sup>1</sup>*Southworth vs. Bennett*, 58 *N. Y.*, 659.

<sup>2</sup>*Ib.*

<sup>3</sup>*Gillett vs. Borden*, 6 *Lans.*, 219, 221.

*Tregent vs. Maybee*, 51 *Mich.*, 191; s. c., 19 *Northw. Rep.*, 962.

*Kelly vs. Bernheimer*, 3 *Supm. Ct. (T. & C.)*, 140.

*American Dock and Improvement Co. vs. Staley*, 4 *Super. Ct. (J. & S.)*, 539.

A party ought not to be compelled to elect before evidence has been given, between two causes of action or defenses unless they are absolutely inconsistent, that is to say incompatible; nor even when they are, if his case is such that he is entitled to a discovery, at the trial, as to the facts necessary to enable him to elect. The present practice sanctions a pleader in asking alternative relief on the same facts; and in supporting the same claim by stating facts in several counts or causes of action, although success upon one will supersede any right to recover on the other phase of his claim. The inconsistency which is ground for compelling election is an absolute incompatibility in the facts alleged, not a mere superfluity of grounds for recovery, nor a mere alternative in legal results arising on such doubts as it may be a part of the object of the trial to investigate and determine. But of this question rulings adverse to this view have often been made.

Compare, for instance, *Walters vs. Continental Insurance Co.*, 5 *Hun.*, 343.

*Roberts vs. Leslie*, 46 *Super. Ct. (J. & S.)*, 76.

*Comstock vs. Hoeft*, 1 *Month. L. Bul.*, 43.

*Brinkman vs. Hunter*, 73 *Mo.*, 172.

Chicago & Alton R. R. Co. *vs.* Smith, 10 *Ill. App.*, 359.

Clapp *vs.* Campbell, 124 *Mass.*, 50.

Sullivan *vs.* Fitzgerald, 12 *Allen (Mass.)*, 482.

Gardner *vs.* Locke, 2 *Civ. Pro. R. (Browne)*, 252.

Dickens *vs.* N. Y. Cent. R. R. Co., 13 *How. Pr.*, 228, and *cas. cit.*

Lake Shore & M. S. R. R. Co. *vs.* Warren, 6 *Pac. Rep.*, 724 (classifying conflicting authorities).

The better opinion is that where a plaintiff has really two distinct and separate grounds for claiming the relief demanded in the complaint, and states each one therein separately and plainly, or where he is somewhat uncertain as to the exact ground of recovery the proof may afford, he may frame a complaint for the recovery of a single claim in several distinct counts or statements, and the Court will not compel him to elect between them.

*So held*, in an action against an insurance company for the loss of property by fire, the complaint alleging, *first*, the issue of a policy thereon, and, *second*, a contract by defendant to insure and to issue a policy.

Velie *vs.* Newark City Ins. Co., 12 *Abb. N. C.*, 309; s. c., 65 *How. Pr.*, 1.

To the same effect in a negligence case.

Railway Co. *vs.* Hedges (*Ohio Com.*, June, 1884), 11 *Weekly Law Bul.*, 326.

In *Bruce vs. Burr*, 67 *N. Y.*, 237, it is held that the Code (§ 150) allows a defendant to put in as many defenses or counterclaims as he may have, and the objection of inconsistency between them is not available. In this case the exception was to the referee's refusal to compel defendant to elect between his original defense (which was rescission for false representations) and a defense added by leave of Court (*viz.*, a counterclaim for false warranty). It was held not error to refuse to compel defendant to elect. It is not held that if the allegations of fact had been incompatible it would have been error to compel election.

The Courts are never bound to give a party time both to prove and disprove the same thing.

10. *Misjoinder*.—The misjoinder of causes of action or defenses not appropriate to be united in the same pleading, unless they are such as to require different modes of trial, is not an incompatibility within the above

rule, and will not sustain a motion at the trial to compel the party to elect.<sup>1</sup>

<sup>1</sup>*Lee Bank vs. Kitching*, 7 *Bosw.* 664; s. c., 11 *Abb. P.* 435.

*Sherman vs. Inman Steamship Co.*, 26 *Hun.* 107.

s. p., *Blossom vs. Barrett*, 37 *N. Y.*, 434.

*Woodman vs. Davis*, 32 *Kans.*, 344; s. c., 4 *Per. Rep.*, 263.

11. *Assessing damages*.—When the Court direct judgment on the pleadings the jury may, under the direction of the Court, assess the damages.

*N. Y. Code Civ. Pro.*, § 1183, last clause.

#### IV.—THE RIGHT TO OPEN AND CLOSE

- |  |   |
|--|---|
| 1. Who entitled to.                                      | 6. Admission offered at the trial.                  |
| 2. Application of the rule.                              | 7. Unessential allegation.                          |
| 3. — several issues.                                     | 8. Plaintiff's right by admitting defendant's case. |
| 4. — several defendants.                                 |   |
| 5. Defendant's right by virtue of admission in pleading. | 9 Refusal of the right, error.                      |
|  | 10. Duty to begin.                                  |

1. *Who entitled to*.—If plaintiff has to give any evidence in order to be entitled to a verdict for the amount claimed, he has the right to begin by opening the case to the jury and adducing his evidence first.

This is the only sound rule under the New Procedure. It is fully established in practice in the State of New York, and, I believe, is also in force, or has been recognized in principle to a greater or less extent, in the States indicated below, as well as in England.

*England*—

*Mercer vs. Whall*, 5 *Q. B. (Ad. & E.)*, 447; 48 *Eng. Com. L.*, 447; s. c., 9 *Jur.*, 576.

*Arkansas*—

*Sillivant vs. Reardon*, 5 *Ark.*, 140.  
*Pogue vs. Joyner*, 7 *id.*, 462, 466.  
*Pierce vs. Lyman*, 28 *id.*, 550.  
*Bertrand vs. Taylor*, 32 *id.*, 470, 476.

*Georgia*—

*McKibbon vs. Folds*, 38 *Geo.*, 235.

*Indiana*—

*City of Aurora vs. Cobb*, 21 *Ind.*, 492, 509.  
*Baltimore & O. R. R. Co. vs. McWhinney*, 36 *id.*, 436,  
 444.  
*Fetters vs. Muncie Nat. Bk.*, 34 *id.*, 251.  
*Camp vs. Brown*, 48 *id.*, 575.  
 But held otherwise in actions of tort in Indiana.  
*Heilman vs. Shanklin*, 60 *id.*, 424.

*Kansas*—

*Perkins vs. Ermel*, 2 *Kans.*, 325.

*Maine*—

*Johnson vs. Josephs*, 75 *Me.*, 544, where the rule is  
 clearly stated.

*Nebraska*—

*Rolf vs. Pillond*, 16 *Nebr.*, 21; s. c., 19 *Northw.*  
*Rep.*, 615.

*New York*—

See cases cited under next point, and *Katz vs. Kuhn*,  
 9 *Daly*, 166, as qualified in 32 *Moak's Eng.*, 276, n.

*North Carolina*—

*Love vs. Dickerson*, 85 *N. C.*, 5.

*Ohio*—

*Dille vs. Lovell*, 37 *Ohio St.*, 415 (a well considered  
 case).

*Virginia*—

*Young vs. Highland*, 9 *Gratt. (Va.)*, 16 (a well  
 considered case).

*Vermont*—

See reasoning in *Goss vs. Turner*, 21 *Vt.*, 437.

It has been held in *Alabama*, *California*, *Maryland* and  
*Massachusetts*, that the plaintiff has the right to open  
 and close in all cases.

*Chamberlain vs. Gaillard*, 26 *Ala.*, 504.  
*Benham vs. Rowe*, 2 *Cal.*, 387; s. c., 56 *Am. Dec.*, 342.  
*Brooke vs. Townshend*, 7 *Gill*, 10, 25.  
*Dorr vs. Tremont Bk.*, 128 *Mass.*, 349.



Except in Maryland, in an avowry for rent in replevin, where the practice was said to be not uniform.

Page *vs. Osgood*, 2 *Gray (Mass.)*, 260.

The books abound in conflicting authorities under the common law procedure, where it was sought to settle the question on theoretic considerations, and in view of artificial rules of pleading which often made it difficult to determine who had the affirmative. The question who has the affirmative of the issue, if it be applied as the test, will generally lead to the above conclusion; but as there are cases in which a legal presumption supplies the place of evidence to establish that affirmative, and other cases in which the party having the negative has the burden of giving evidence because the facts are peculiarly within his knowledge, that rule does not serve as a guide to the right to open and close, unless close attention is paid to its exceptions. The little volume of *Best on the Right to Begin*, an admirable analysis of conflicting authorities and deduction of resulting rules, is not a safe guide under the New Procedure.

The only substantial question raised by the recent American authorities touching this point is whether the necessity of evidence in order to establish the amount of damages, when the existence of a cause of action is admitted, entitles the plaintiff to begin, or whether he must, in such case, wait until defendant has adduced evidence in support of his justification or other affirmative defense. The latter has been held to be the rule in *Illinois*, *Indiana*, *New Hampshire*, *South Carolina* and *Kentucky*.

*Chicago, Burlington, etc., R. R. Co. vs. Bryan*, 90 *Ill.*, 126, 134.

*McLees vs. Felt*, 11 *Ind.*, 218, 220 (and see *above*).

*Seavy vs. Dearborn*, 19 *N. H.*, 351.

*Moses vs. Gatewood*, 5 *Rich. (S. C.)*, 234.

*M'Kenzie vs. Milligan*, 1 *Bay (S. C.)*, 248.

*Goldsberry vs. Stuteville*, 3 *Bibb (Ky.)*, 345.

But when a plaintiff has to prove his cause of action as well as his damages, he is required to give his evidence on both points while presenting his case in chief, and cannot reserve his evidence as to damages until rebuttal. Where an admission takes the place of evidence as to the cause of action, the rule of convenience in respect to proving damages remains unchanged. It has been said in support of the other view that when a cause of action is admitted, it is then for defendant to attempt to establish his justification or other affirmative defense, and if

he fails the case stands as if there were a default, and plaintiff can thereupon give evidence to assess his damages. The fallacy of this is that if defendant gives any substantial evidence in support of his affirmative defense it cannot be known whether he has sustained it or not until the verdict is received. Hence, the most convenient time practically to prove damages is also the most appropriate theoretically,—before defendant opens ; and if defendant wishes the right to begin he should be held to admit all that plaintiff has any right to prove under his pleading.

The test formerly stated, and sometimes repeated even in cases under the New Procedure, that the party against whom judgment would go if no evidence were given has the right to begin, is not a safe guide under the New Procedure, for now partial defenses may be pleaded ; and if a partial defense is the only defense, plaintiff would be entitled to judgment if no evidence were given, but nevertheless, if the partial defense is only a traverse of a part of his complaint or allegations of damage, he is entitled to give evidence, and therefore to open and close in order that he may recover the full amount claimed.

The simple rule stated in the text will readily solve all controversies as to the right to begin, due attention being given to the following considerations :

2. *Application of the rule.*—This rule applies even where plaintiff has only to prove damages,<sup>1</sup> whether general<sup>2</sup> or special.

<sup>1</sup> *Fry vs. Bennett*, 28 *N. Y.*, 324 ; affirming 3 *Bosw.*, 200.

*Littlejohn vs. Greeley*, 13 *Abb. Pr.*, 41, 45.

*Huntington vs. Conkey*, 33 *Barb.*, 218.

*Johnson vs. Josephs*, 75 *Me.*, 544.

<sup>2</sup> *Opdyke vs. Weed*, 18 *Abb. Pr.*, 223, note.

*Hecker vs. Hopkins*, 16 *Abb. Pr.*, 301, note.

Under the New Procedure matter of aggravation of damages may be pleaded, for every fact of which evidence may be given at the trial is material and may be pleaded.

*Millington vs. Loring*, 29 *W. R.*, 207.

See also *Stetson vs. Croskey*, 52 *Penn. St.*, 230.

But the mere computation of interest is not matter of evidence within the rule.

*Huntington vs. Conkey*, 33 *Barb.*, 218.

*Brennan vs. Security Life Ins., etc., Co.*, 4 *Daly*, 296.

The reason is that it is a deduction of law and not a question of fact; but the facts on which the right to interest depends are matter for evidence.

3. — *several issues*.—If defendant's pleading raises several issues, plaintiff is entitled to the right to begin if he has any proof to give under any of them.

Montgomery *vs.* Swindler, 32 *Ohio St.*, 224, 226.

Slauson *vs.* Englehart, 34 *Barb.*, 198.

The rule was the same at common law.

Jackson *vs.* Pittsford, 8 *Blackf. (Ind.)*, 194.

Bowen *vs.* Spears, 20 *Ind.*, 146, 147.

Buzzell *vs.* Snell, 25 *N. H. (4 Fost.)*, 474.

Lexington, etc., Ins. Co. *vs.* Paver, 16 *Ohio*, 324.

But the right of the Court in such case to sever the issues and give the opening and closing to each party accordingly, was recognized in

Central Bank *vs.* St. John, 17 *Wis.*, 157; and

Vuyton *vs.* Brenell, 1 *Wash. C. Ct.*, 467.

4. — *several defendants*.—Where there are several defendants the Court may properly require the plaintiff to begin, if he has a right to begin as against any defendant.

Sodousky *vs.* McGee, 4 *J. J. Marsh. (Ky.)*, 267 (a well considered case).

And see Kirkpatrick *vs.* Armstrong, 79 *Ind.*, 384.

Katz *vs.* Kuhn, 9 *Daly*, 166; justly qualified by Mr. Moak in 32 *Moak's Eng.*, 276, n.

5. *Defendant's right by virtue of admission in pleading*.—Defendant's pleading does not entitle him to begin, unless, when taken as a whole, it unqualifiedly admits every material allegation of plaintiff's pleading.<sup>1</sup>

<sup>1</sup> Thus in an action for goods sold, an admission of the purchase, coupled with an allegation that defendant agreed to pay, not in money but in merchandise, is, though in form a new matter, in effect only a denial of the contract as alleged.

Bradley *vs.* Clark, 1 *Cush. (Mass.)*, 293.

Gilland *vs.* Lawrence, 13 *Weekly Dig.*, 372.

So in an action for price of services or goods an allegation of negligence or deficiency in quality, stated as a ground for recoupment, does not admit the cause of action.

*Fiedeldey vs. Reis*, 12 *Cin. Law Bul.*, 76.

Citing *Simmons vs. Green*, 35 *Ohio St.*, 104.

*Graham vs. Gautier*, 21 *Tex.*, 111 (an action for damages for malpractice). This question is still contested.

*Penhryn Slate Co. vs. Meyer*, 8 *Daly*, 61.

*Howard vs. Hayes*, 47 *Super. Ct. (J. & S.)*, 89.

But compare *Stronach vs. Bledsoe*, 85 *N. C.*, 473.

For other illustrations see

*Goodpaster vs. Voris*, 8 *Iowa*, 334.

*Lindsley vs. European Petroleum Co.*, 10 *Abb. Pr., N. S.*, 107; s. c., 41 *How. Pr.*, 56.

*Vance vs. Vance*, 2 *Metc. (Ky.)*, 581.

*Thompson vs. Mills*, 39 *Ind.*, 528, 534.

Whether an allegation which is in form new matter, but is in fact inconsistent with a material allegation of the complaint, is to be deemed a denial under the New Procedure, is a question on which there is much difference of opinion.

Compare with above cases 8 *Abb. N. Y. Dig. (new ed., vol. 2 of Supp.)*, 509, §§ 184, 185.

The better view is that for the purpose of determining the right to begin, the admission of plaintiff's case which defendant relies on, must be explicit and not obscure; and that if his answer gives an inconsistent version merely, without an express denial, he may be required to make an express admission of plaintiff's version as a condition of claiming the right to begin. Argumentative denials, and affirmative statements which imply a denial, have generally been held to leave the right to begin with plaintiff.

*Haines vs. Kent*, 11 *Ind.*, 126.

*Denny vs. Booker*, 2 *Bibb (Ky.)*, 427.

*Thurston vs. Kennett*, 22 *N. H. (2 Fost.)*, 151.

*Churchill vs. Lee*, 77 *N. C.*, 341.

*Beatty vs. Hatcher*, 13 *Ohio St.*, 115.

But compare

*City of Aurora vs. Cobb*, 21 *Ind.*, 492.

*Patton vs. Hamilton*, 12 *id.*, 256.

*Hoxie vs. Greene*, 37 *How. Pr.*, 97.

*De Graff vs. Carmichael*, 13 *Hun*, 129.

6. *Admission offered at the trial.*—Defendant has the right to begin, if by leave of Court he withdraws or strikes out all denial from his pleading,<sup>1</sup> or if he makes

an unqualified,<sup>2</sup> oral<sup>3</sup> or written admission,<sup>4</sup> conceding all that the plaintiff would need to prove to entitle him to recover the amount claimed.

Attorney or counsel has implied authority to make such admission.<sup>6</sup>

But it is not enough to admit<sup>7</sup> that plaintiff has a *prima facie* case, supposing that defendant should fail to establish his affirmative defense. The admission must be of the facts.<sup>8</sup>

<sup>1</sup>Harvey vs. Ellithorpe, 26 Ill., 418.

<sup>2</sup>An admission coupled with a contingency is not enough. Camp vs. Brown, 48 Ind., 575.

In this case the action was on a note including reasonable attorneys' fee, and an admission that a specified sum would be reasonable if plaintiff should be found entitled to recover the whole amount of the note, was held insufficient to entitle defendant to begin.

<sup>3</sup>To the contrary was Johnson vs. Wideman, Dudley (So. Car.), 325, where it was held that the admission must be of record, before trial. To same effect was Gray vs. Cottrell, 1 Hill (So. Car.), 26. But the practice under the New Procedure does not require this. Plaintiff, however, should see that the admission is entered in the minutes.

<sup>4</sup>Campbell vs. Roberts, 66 Geo., 733.  
City of Aurora vs. Cobb, 21 Ind., 492, 509.  
Katz vs. Kuhn, 9 Daly, 166.

<sup>5</sup>Bertrand vs. Taylor, 32 Ark., 470, 476.  
Burroughs vs. Hunt, 13 Ind., 178, 180.

<sup>6</sup>See Oliver vs. Bennett, 65 N. Y., 559.  
Oscanyan vs. Arms Co., 103 U. S. (13 Otto), 261.  
And compare pp. 11, 12 of this brief, Par. 15, note 2, with Arthur vs. Homestead Fire Ins. Co., 78 N. Y., 462; s. c., 34 Am. R., 550.

<sup>7</sup>Wigglesworth vs. Atkins, 5 Cush. (Mass.), 212. The rule of Court referred to in this last case is to be found in 8 Cush., 603, n.

<sup>8</sup>It is not enough that plaintiff has obtained an auditor's report in his favor, for he may or may not use it. Snow vs. Batchelder, 8 Cush. (Mass.), 513.

Nor if he does use it, does it change the right to begin if its conclusion is impugned by defendant. Chesley vs. Chesley, 37 N. H., 229.

It is said in *Sanders vs. Johnson*, 6 *Blackf. (Ind.)*, 50 ; s. c., 36 *Am. Dec.*, 564, that if plaintiff has been compelled to keep his witnesses in attendance till after commencing to swear the jury, it is unreasonable to deprive him of the privilege of opening.

7. *Unessential allegation.*—An allegation not essential to the party's recovery of the amount claimed, need not be admitted by the other in order to entitle the latter to the right to begin.<sup>1</sup> The fact that a party has alleged that he has not the burden of proving in order to recover, does not entitle him to begin.<sup>2</sup>

<sup>1</sup>Thus where plaintiffs sued for goods sold by them jointly, their allegation that they were partners, though it is relevant, and, it may be, material, in case plaintiff has to give evidence, is not essential to enable them to recover the amount claimed; and hence, an admission of the sale, though coupled with a denial of the partnership, is a sufficient admission within the rule.

*Millerd vs. Thorn*, 56 *N. Y.*, 402; s. c., 15 *Abb. Pr.*, *N. S.*, 371.

So a demand in the answer for the production of an instrument, a copy of which is annexed to the complaint, coupled with an admission of the genuineness of the original, does not change the rule.

*Murray vs. N. Y. Life Ins. Co.*, 85 *N. Y.*, 236 ; s. c., 9 *Abb. N. C.*, 309 ; rev'g 19 *Hun*, 350.

Nor does defendant's denial of an allegation not essential to recovery, but relevant only as anticipating and avoiding an expected defense.

*List vs. Kortepeter*, 26 *Ind.*, 27.

But compare *Fry vs. Bennett*, 28 *N. Y.*, 324 ; aff'g 3 *Bosw.*, 200, where it was held that an allegation of malice in the publication of an article apparently privileged was one which plaintiff had a right to prove, and had therefore a right to begin for the purpose of proving.

<sup>2</sup>*Millerd vs. Thorn*, 56 *N. Y.*, 402 ; s. c., 15 *Abb. Pr.*, *N. S.*, 371.

*Claffin vs. Baere*, 28 *Hun*, 204,—where the allegation was defendant's allegation, in form as a separate defense, that the goods were sold on a credit which had not expired ; for this was in legal effect only a denial of part of plaintiff's case.

8. *Plaintiff's right by admitting defendant's case.*—Where defendant would be entitled to begin under the foregoing rules, yet nevertheless if the plaintiff, by reply admitting and avoiding defendant's allegation of a new matter, or by an unqualified oral admission at the trial, concedes all that defendant would have to prove in order to entitle himself to a verdict, or to a reduction of plaintiff's recovery to the full extent which defendant has claimed, then plaintiff has the right to begin.

- Viele vs. Germania Insurance Co.*, 26 *Iowa*, 9.  
*Brown vs. Kirkpatrick*, 5 *So. Car.*, 267.  
*Love vs. Dickerson*, 85 *N. C.*, 5.  
*Judah vs. Vincennes University*, 23 *Ind.*, 272.  
*Bowen vs. Spears*, 20 *id.*, 146.  
*Mann vs. Scott*, 32 *Ark.*, 593, 596.  
*Richards vs. Nixon*, 20 *Pa. St.*, 19.

9. *Refusal of the right, error.*—An exception lies to the refusal of the right to begin.

- Tobin vs. Jenkins*, 29 *Ark.*, 151.  
*James vs. Kiser*, 65 *Geo.*, 515.  
*Colwell vs. Brower*, 75 *Ill.*, 516.  
*Chicago, Burlington & Q. R. R. Co. vs. Bryan*, 90 *id.*, 126, 134.  
*Shank vs. Fleming*, 9 *Ind.*, 189.  
*Judah vs. Vincennes University*, 23 *id.*, 272, 284.  
*Denny vs. Booker*, 2 *Bibb (Ky.)*, 427.  
*Johnson vs. Josephs*, 75 *Me.*, 544.  
*Millerd vs. Thorn*, 56 *N. Y.*, 402; s. c., 15 *Abb. Pr. N. S.*, 371.  
*Opper vs. Caillon*, 9 *Weekly Dig.*, 39; s. c., 9 *Dal.*, 157.  
*Murray vs. N. Y. Life Ins. Co.*, 9 *Abb. N. C.*, 309; s. c., 85 *N. Y.*, 236; rev'g 19 *Hun*, 350.  
*Hudson vs. Wetherington*, 79 *N. C.*, 3.  
*Stronach vs. Bledsoe*, 85 *id.*, 473.  
 And see 22 *Moak's Eng.*, 739.  
 [Contra, *Day vs. Woodworth*, 13 *How. (U. S.)*, 363.  
*Hall vs. Weare*, 92 *U. S. (2 Otto)*, 728.  
*Goodpaster vs. Voris*, 8 *Iowa*, 334.]

The error of refusal is not cured by allowing the claimant the closing address.

*Penhryn Slate Co. vs. Meyer*, 8 *Daly*, 61.

10. *Duty to begin.*—The party who has the right to begin may be required to do so; and, if he refuse, the other party may rest on the admission which gave the right to begin, and take a verdict accordingly.

What amounts to a waiver of the right.

See *Goodwin vs. Hirsch*, 37 *Super. Ct. (J. & S.)*, 503.

*Merrill vs. Calcagnino*, 8 *Weekly Dig.*, 487.

*De Graff vs. Carmichael*, 13 *Hun*, 129.

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## V.—THE OPENING.

Limits of the opening.

— rehearsing evidence.

— exception.

4. Reading the pleadings.

5. Motion to dismiss, or for verdict, on the opening.

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1. *Limits of the opening.*—The object of an opening is to state briefly the nature of the action, the substance of the pleadings, the points in issue, the facts, and the substance of the evidence counsel is about to introduce.

Plaintiff's counsel in opening, may also state the nature of the defense, if it appears upon the record,<sup>1</sup> and the manner in which he proposes to disprove it.<sup>2</sup>

<sup>1</sup> *Ayrault vs. Chamberlain*, 33 *Barb.*, 229.

The English practice of anticipating the defense does not prevail with us. Our rule does not require, and should not allow, an opening in respect to the defense, except in an incidental way by a brief statement of its general character. *Ib.*

<sup>2</sup> *Burrill's Pr.*, 234.

2. — *rehearsing evidence.*—Counsel has not a right to state intended evidence in detail, nor to read documents he proposes to offer, so as to get matter before the jury without opportunity for the Court to decide on its admissibility.<sup>1</sup>



But he may state the material facts he relies on, and in so doing may refer to documents to refresh his memory.

<sup>1</sup>*Scripps vs. Reilly*, 35 *Mich.*, 371; s. c., 24 *Am. Rep.*, 573.

3. — *Exception*.—An exception lies to allowing counsel to go beyond the above limits in opening.

Such exceptions should be sustained if a verdict is obtained apparently in consequence of the error.

*Scripps vs. Reilly*, 38 *Mich.*, 10.

*Porter vs. Throop*, 47 *Mich.*, 313; s. c., 11 *Northw. Rep.*, 174.

*Rickabus vs. Gott*, 51 *Mich.*, 227; s. c., 16 *Northw. Rep.*, 384.

And see *Ayrault vs. Chamberlain*, 33 *Barb.*, 229.

4. *Reading the pleadings*.—It is a matter of discretion with the judge, whether he will allow the pleading to be read to the jury except so far as they have first been put in evidence. If they contain irrelevant allegations, raising issues improper for the jury's consideration, it is proper to prohibit them from being read.

The reason is that the pleadings are for the Court; the counsel may be required to read them or state their substance, if necessary, to enable the Court to understand the issues raised or the materiality of evidence offered; but the facts stated in them, except so far as admitted, cannot be considered until put in evidence.

*Willis vs. Forrest*, 2 *Duer*, 310.

s. p., *Drew vs. Andrews*, 8 *Hun*, 23.

Compare *Garfield vs. Knight*, 14 *Cal.*, 35.

The right to read the adverse party's pleading in evidence against him is another matter.

5. *Motion to dismiss, or for verdict, on the opening*.—If counsel's opening discloses a fatal objection to his action or defense, or if he expressly puts his case solely on a ground untenable in point of law, the Court may refuse to hear evidence in support of it, and dismiss the complaint or direct a verdict.<sup>1</sup>

To justify granting such a motion the admission must be one which is necessarily fatal to the case.<sup>2</sup>

It is not good practice to grant such a motion unless the opening has been taken down by the stenographer, or the statements relied on are noted in writing.

<sup>1</sup>Familiar practice, and sustained more or less expressly in *Oscanyan vs. Arms Co.*, 103 *U. S.* (13 *Otto*), 261. *Ward vs. Jewett*, 4 *Robt.*, 714.

[Not allowed in Wisconsin.

*Smith vs. Commonw. Ins. Co.*, 49 *Wisc.*, 322; s. c., 5 *Northw. Rep.*, 802.]

The reason is that the Court ought not to spend time in hearing evidence of facts that will not sustain an action.

If the Court is one in which a nonsuit cannot be ordered without plaintiff's consent, a verdict may be directed.

*Oscanyan vs. Arms Co.* (*above*).

<sup>2</sup>*Stewart vs. Hamilton*, 3 *Robt.*, 672; s. c., 18 *Abb. Pr.*, 298; 28 *How. Pr.*, 265.

*Emmerson vs. Weeks*, 58 *Cal.*, 382.

## VI.—ORDER OF PROOF.

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|---|---|
| 1. Each side in turn must exhaust his case.       | 7. Exhausting witnesses and subjects.   |
| 2. Anticipatory rebuttal.                         | 8. Limits of cross-examination.         |
| 3. Right of rebuttal.                             | 9. — of party testifying in own behalf. |
| 4. Defendant's right of reply.                    | 10. Cross-examination at large.         |
| 5. Receiving conditionally on promise to connect. | 11. Several defendants.                 |
| 6. — precluding offer by admitting fact.          | 12. Counterclaim.                       |
|   | 13. Reopening.                          |

1. *Each side in turn must exhaust his case.*—As a general rule, he who has the opening ought to introduce all his evidence to make out his side of the issue, except that which merely serves to answer the adversary's case; when the evidence of the adversary is heard, and finally the party who had the opening may introduce rebutting

evidence which merely serves to answer or qualify his adversary's case.<sup>1</sup>

Rebutting evidence within this rule means not all evidence whatever which contradicts defendant's witnesses and corroborates plaintiff's, but evidence in denial of some affirmative case or fact which defendant has attempted to prove.<sup>2</sup> Neither side ought to be permitted to give evidence by piecemeal.

This rule does not prevent a party who has closed his case from supporting it further by the cross-examination of his adversary's witnesses,<sup>3</sup> nor from using parts of documents which the adversary has put in for the purpose of using other parts against him.

And the judge has discretionary power to receive evidence in chief during the rebuttal.<sup>4</sup>

<sup>1</sup>Braydon vs. Goulman, 1 *Monr. (Ky.)*, 115.

Silverman vs. Foreman, 3 *E. D. Smith*, 322.

Pettibone vs. Derringer, 4 *Wash. C. Ct.*, 215.

Gilpins vs. Consequa, *Pet. C. Ct.*, 85; s. c., 3 *Wash. C. Ct.*, 184.

Macullar vs. Wall, 6 *Gray*, 507.

Hathaway vs. Hemingway, 20 *Conn.*, 195.

<sup>2</sup>Silverman vs. Foreman, 3 *E. D. Smith*, 322 (opin. by WOODRUFF, J.), approved in *Marshall vs. Davies*, 78 *N. Y.*, 414, 420; rev'g 16 *Hun*, 606.

And see reasoning in *Goss vs. Turner*, 21 *Vt.*, 437.

<sup>3</sup>It is competent for a party, after having closed his case, so far as relates to the evidence, to introduce additional evidence, by the cross examination of the witnesses of the other side, for the purpose of more fully proving his case.

*Commonwealth vs. Eastman*, 1 *Cush. (Mass.)*, 189.

<sup>4</sup>Hastings vs. Palmer, 20 *Wend.*, 225.

Ford vs. Niles, 1 *Hill*, 300 (COWEN, J.).

*Marshall vs. Davies*, 78 *N. Y.*, 414, 420; rev'g 1 *Hun*, 606.

Agate vs. Morrison, 84 *N. Y.*, 672.

Braydon vs. Goulman, 1 *Monr. (Ky.)*, 115.

State vs. Alford, 31 *Conn.*, 40.

Walker vs. Walker, 14 *Geo.*, 242.

State vs. Fox, 25 *N. J. L.*, 566.

In Maine, it appears to be of course to allow the party to give cumulative evidence after closing, unless notified then by the judge that he will not be allowed to do so.

Dane *vs.* Treat, 35 *Me.*, 198.

The rule is not strictly applied in New Hampshire.

Pierce *vs.* Wood, 23 *N. H.*, 519.

In Vermont, plaintiff having rested with a *prima facie* case is allowed to support it further during rebuttal.

Clays *vs.* Ferris, 10 *Vt.*, 112.

Unless defendant gave no contrary evidence.

Pingry *vs.* Washburn, 1 *Aik. (Vt.)*, 264; s. o., 15 *Am. Dec.*, 676.

2. *Anticipatory rebuttal.*—A party may properly be allowed, as part of his case in chief, to give evidence to rebut matter which his adversary avows an intention of relying on;<sup>1</sup> but he is not required to do so.<sup>2</sup> If he does so, he makes it part of his case, and further evidence on the point is not, of right, allowable in rebuttal.<sup>3</sup>

<sup>1</sup>York *vs.* Pease, 2 *Gray (Mass.)*, 282.

Williams *vs.* De Witt, 12 *Ind.*, 309.

Bancroft *vs.* Sheehan, 21 *Hun*, 550.

Dunn *vs.* People, 29 *N. Y.*, 523 (the avowal here was in answer to a question put by the judge).

Dimick *vs.* Downs, 82 *Ill.*, 570, 572.

*Dictum to contrary*, in *U. S. vs. Clifford*, 1 *Cliff.*, 98.

<sup>2</sup>Bancroft *vs.* Sheehan, 21 *Hun*, 550.

<sup>3</sup>Holbrook *vs.* McBride, 4 *Gray (Mass.)*, 282.

Williams *vs.* De Witt, 12 *Ind.*, 309, where it was held error to allow it, citing 21 *Eng. Com. L.*, 21.

3. *Right of rebuttal.*—A party has a right, in rebuttal, to give evidence which tends to meet the affirmative case, if any, sought to be established by his adversary, and it is error to refuse it;<sup>1</sup> and it is no objection to such evidence that it incidentally tends also to corroborate the party's case in chief,<sup>2</sup> nor that it may necessitate allowing the adverse party a sur-rebuttal.<sup>3</sup>

<sup>1</sup>Bancroft *vs.* Sheehan, 21 *Hun*, 550 (judgment reversed for exclusion of such evidence).

<sup>2</sup>Chadbourn *vs.* Franklin, 5 *Gray (Mass.)*, 312 (opinion by SHAW, Ch. J.).

<sup>3</sup>Scott *vs.* Woodward, 2 *McCord (So. Car.)*, 161.

4. *Defendant's right of reply.*—After plaintiff's rebuttal defendant has a right in reply to give evidence which tends to meet the affirmative case, if any, or any new and distinct fact, sought to be established by plaintiff's rebuttal, which defendant had not opportunity of meeting in his case in chief; and it is error to refuse it.

*Asay vs. Hay*, 89 *Penn. St.*, 77. The Court say: Had it been competent for the defendant to prove in chief what he offered in rebuttal the Court might have refused a re-examination of the witness. As to matters that require explanation, or as to new matter introduced by the opposing interest, a party has a right in rebuttal to re-examine his witnesses.

*Kent vs. Lincoln*, 32 *Vt.*, 591.

The rule in Vermont, however, strictly excludes evidence in reply on any point defendant has already had full opportunity to meet.

*Thayer vs. Davis*, 38 *Vt.*, 163.

So held even where the evidence was, incidentally at least cumulative, but the plaintiff could not have been prejudiced.

*Walker vs. Fields*, 28 *Geo.*, 237.

In contradicting the adversary's evidence that a particular interview was had, testimony that no such interview ever occurred, does not let in evidence in rebuttal that such an interview was had at another time.

*Marshall vs. Davies*, 78 *N. Y.*, 414, 420.

5. *Receiving conditionally on promise to connect.*—

If evidence apparently incompetent only because its relevancy is not apparent, or because it is not the best evidence, is offered, the Court may receive it conditionally, if counsel gives assurance that he will supply the necessary foundation afterward.

*U. S. vs. Flowery*, 1 *Sprague*, 109; s. c., 8 *Law R.*, 253.

*Deery vs. Cray*, 10 *Wall*, 263.

*Place vs. Minster*, 65 *N. Y.*, 89 (conspiracy).

*First Unitarian Soc. vs. Faulkner*, 91 *U. S.* (1 *Otto*), 415.

But if the evidence does not prove relevant, the judge's instructions may perhaps not cure the error.

6. — *precluding offer by admitting fact.*—Upon a conclusive admission of fact being made by counsel, the Court may in its discretion exclude an offer of further evidence of the fact admitted,<sup>1</sup> unless the offer goes beyond the admission.<sup>2</sup>

But this does not extend to shutting off strict cross-examination.<sup>3</sup>

<sup>1</sup>*Dorr vs. Tremont Bank*, 128 *Mass.*, 349.

*Bannister vs. Alderman*, 111 *id.*, 261 (holding it no error to rule either way).

*Ainsworth vs. Hutchins*, 52 *Vt.*, 554.

*Butterworth vs. Pecare*, 8 *Bosw.*, 671.

The reason is, the Court is not bound to spend time in taking evidence and ruling on a point which is not controverted. But the power to refuse should be sparingly used.

It is not error to admit the evidence.

*Hancock Mut. Life Ins. Co. vs. Moore*, 34 *Mich.*, 41.

"It would be absurd to hold that any party, by his bald admissions on a trial, could shut out legal evidence."

*Kimball, etc., Mfg. Co. vs. Vroman*, 35 *Mich.*, 310.

<sup>2</sup>As for instance, where the offer is to show circumstances, manner, etc., as being relevant in aggravation.

See also *Priest vs. Groton*, 103 *Mass.*, 540.

That a party is not bound to take a disclaimer of damages, as reason for excluding evidence,

See *Brown vs. Perkins*, 1 *Allen (Mass.)*, 89, 96.

<sup>3</sup>*Berger vs. Clippert (Mich., 1884)*, 19 *Northw. Rep.*, 149.

7. *Exhausting witnesses and subjects.*—It is proper to require a party calling a witness to complete his examination exhaustively, before calling another;<sup>1</sup> but it is error to refuse to allow a witness whose examination has been closed to be recalled for a rebuttal which involves a new subject, or a contradiction of what there was not opportunity to contradict on the direct.<sup>2</sup>

Subject to this rule, it is not improper to require a party adducing evidence upon a subject to exhaust all his evidence as to that subject before proceeding to another;<sup>3</sup>

and whether, after giving evidence on another part of his case, he shall be permitted to return and resume the former subject, is in the discretion of the Court.

<sup>1</sup>*People vs. Mather*, 4 *Wend.*, 229, 249.

*Treadwell vs. Goodwin*, 6 *Bosw.*, 538, 549.

*Beaulieu vs. Parsons*, 2 *Minn.*, 37.

<sup>2</sup>*Jones vs. Smith*, 64 *N. Y.*, 180, 184.

<sup>3</sup>*Rowe vs. Brenton*, 3 *Mann. & Ry.*, 133, 139.

8. *Limits of cross-examination.*—A party has not a right, before his adversary's case is closed, to introduce his own case to the jury by cross-examining the witness of his adversary on matters beyond the limit of the direct examination of such witness.<sup>1</sup>

The limit of a strict cross-examination within the meaning of this rule includes whatever tends to qualify or explain his direct testimony, or rebut or modify any inference resulting from it.<sup>2</sup>

<sup>1</sup>*Houghton vs. Jones*, 1 *Wall.*, 702.

"The cross-examination of a witness must be limited to matters stated in his direct examination." *Ib.*, per FIELD, J.

*Phila. & Trenton R. R. Co. vs. Stimpson*, 14 *Pet.*, 448, 461 (leading case).

*Neil vs. Thorn*, 88 *N. Y.*, 275.

*Ellmaker vs. Buckley*, 16 *Serg. & R.*, 72.

*Bell vs. Prewitt*, 62 *Ill.*, 362.

*Pellersells vs. Allen*, 56 *Iowa*, 717; s. c., 10 *Northw. Rep.*, 261.

*Cool vs. Roche*, 15 *Nebr.*, 24; s. c., 17 *Northw. Rep.*, 119 (holding that direct examination as to possession merely, does not entitle to inquire on cross-examination as to the right by which it was held).

[*Contra*, *Moody vs. Rowell*, 17 *Pick.*, 490; s. c., 28 *Am. Dec.*, 317, 323 (SHAW, Ch. J.).]

<sup>2</sup>*Wilson vs. Wagar*, 26 *Mich.*, 452.

*Campau vs. Dewey*, 9 *id.*, 381, 419.

*Haynes vs. Ledyard*, 33 *id.*, 319.

*Ferguson vs. Rutherford*, 7 *Nev.*, 385.

And see for instances *Baird vs. Daly*, 68 *N. Y.*, 547, 550.

*Mayer vs. People*, 80 *N. Y.*, 364, 378.

9. — *of party testifying in own behalf.*—A greater latitude is allowable in the cross-examination of a party who testifies on his own behalf; but even there the limits of the cross-examination, beyond the scope of the direct, is in the discretion of the judge.

*Rea vs. Missouri*, 17 *Wall.*, 542.

10. *Cross-examination at large.*—It is in the discretion of the Court, in controlling the order of proof, to allow cross-examining counsel to go beyond the limits of strict cross-examination and introduce matters in support of his own case.

*Neil vs. Thorn*, 88 *N. Y.*, 270, 276 (*dictum*).

[*Contra*, *Bell vs. Prewitt*, 62 *Ill.*, 362 (reversing judgment for allowing cross-examination at large).]

11. *Several defendants.*—Where there are several defendants, having separate defenses, it is in the discretion of the judge in what order they shall cross examine, present their case and sum up.<sup>1</sup>

If their interests are identical, they may be confined to one counsel in so doing for all, as if their defense was joint.<sup>2</sup>

<sup>1</sup>*Fletcher vs. Crosbie*, 2 *M. & Rob.*, 417.

<sup>2</sup>*Chippendale vs. Masson*, 4 *Camp.*, 174.

*Mason vs. Ditchbourne*, 1 *M. & Rob.*, 462, n.

12. *Counterclaim*—Where a counterclaim is interposed, beside denials or other defenses to the cause of action, it is in the discretion of the Court to try both together, or to postpone defendant's evidence as to his counterclaim, including his examination of plaintiff thereon, until after the close of plaintiff's case.

*Thompson vs. Woodfine*, 38 *L. T. R.*, *N. S.*, 753; *s. c.*, 26 *Weekly R.*, 678; 47 *L. J.*, *Ch.*, 832.



13. *Reopening*.—Even after both parties have rested, the admission or exclusion of further evidence is in the discretion of the judge.<sup>1</sup> But an exception may be taken, and if the ruling be an abuse of discretion relief may be had.<sup>2</sup>

On reopening the case the Court may prescribe the extent and limits thereof;<sup>3</sup> and, after taking further evidence has been commenced, a party has a right to complete it,<sup>4</sup> but not to go beyond the limits prescribed.<sup>5</sup>

<sup>1</sup> *Williams vs. Hayes*, 20 *N. Y.*, 58.

*Caldwell vs. N. J. Steamboat Co.*, 47 *N. Y.*, 282, 295;  
aff'g 56 *Barb.*, 425.

*Phil., etc., R. R. Co. vs. Stimpson*, 14 *Pet.*, 448.

Even if the further testimony be the re-examination of a witness who has once been examined.

*People vs. Rector*, 19 *Wend.*, 569.

The English rule, which is somewhat more strict than the American, still allows that if a party is taken by surprise at the statements made by the other side, on a point that is relevant, and which he has had no opportunity of meeting, and on which there has been no cross-examination, the Court have power to reopen the case, and even a witness already examined may be recalled.

*Rogers vs. Manley*, 42 *L. T. R.*, *N. S.*, 584.

Citing *Tayl. Ev.*, 6 ed., par. 359, p. 392.

<sup>2</sup> *Meyer vs. Cullen*, 54 *N. Y.*, 392.

*Meacham vs. Moore*, 59 *Miss.*, 561.

Compare, as to remedy, 1 *Graham's Pr.*, 3 ed., 740.

*Owen vs. O'Reilly*, 20 *Mo.*, 603.

<sup>3</sup> *State vs. Harris*, 63 *N. C.*, 1.

<sup>4</sup> *Mobile F. D. Ins. Co. vs. Parsons*, 11 *Weekly Dig.*, 414.

<sup>5</sup> *Stephens vs. Fox*, 83 *N. Y.*, 313; aff'g 17 *Hun*, 435.

## VII.—OFFERS OF EVIDENCE AND OBJECTIONS.

[To sustain an exception to the rejection of evidence counsel should make his offer in such plain and unequivocal terms as to leave no room for doubt as to what was intended. If he leaves the offer fairly open to two constructions he cannot insist in a court of review on the construction most favorable to himself, unless it is justly inferrible that he was so understood by the judge who rejected the evidence.]

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- |   |   |
|---|---|
| 1. Offer in hearing of jury.                                    | 9. — by offer or challenge.                                     |
| 2. Offer without putting question.                              | 10. Opening the door for one's self.                            |
| 3. Calling for disclosure—before swearing witness.              | 11. Opening the door for adversary—by error, against objection. |
| 4. — before putting question.                                   | 12. Retracting.   |
| 5. Offer of document.   | 13. Right to call for ground of objection.                      |
| 6. — of part of series or complex document.                     | 14. Cross-examining as to competency.                           |
| 7. Necessity of promise to connect.                             | 15. — counter proof.  |
| 8. Opening the door for adversary —by error, without objection. | 16. — arguing.  |
- 

1. *Offer in hearing of jury.*—If offered evidence be oral the offer is necessarily oral, and may be made notwithstanding the presence and hearing of the jury.<sup>1</sup> If it be documentary, the judge may require that the document be submitted to him to determine its admissibility before being allowed to be read in the presence of the jury, against objection.<sup>2</sup>

<sup>1</sup>But reiterated offers in their hearing, after exclusion, should not be tolerated.

Scripps *vs.* Reilly, 38 *Mich.*, 10.

<sup>2</sup>Gould *vs.* Weed, 12 *Wend.*, 12, 24.

Scripps *vs.* Reilly, 38 *Mich.*, 10.

Keedy *vs.* Newcomer, 1 *Md.*, 241.

The judge should not permit reading to him as an indirect way of letting the jury hear.

Philpot *vs.* Taylor, 75 *Ill.*, 309, 312.

Reading in the hearing of the jury held not error, in Brill *vs.* Flagler, 23 *Wend.*, 353.

2. *Offer without putting question.*—An offer of oral evidence may be refused if the witness is not present in Court,<sup>1</sup> and circumstances indicate that the offer is not made in good faith.<sup>2</sup>

<sup>1</sup>Robinson *vs.* State, 1 *Lea* (Tenn.), 673.  
Eschbach *vs.* Hurtt, 47 *Md.*, 61, 66.

<sup>2</sup>Scotland County *vs.* Hill, 112 *U. S.*, 183, 186.

3. *Calling for disclosure—before swearing witness.*—The Court may, as a condition of allowing a witness to be sworn or examined, require counsel, if able to do so, to state the substance of what he proposes to prove by him.<sup>1</sup>

If no request or disclosure be made, it is error to refuse to allow a witness to be sworn, if he was competent to testify to anything, although he may have been incompetent as to other things.<sup>2</sup>

<sup>1</sup>Roy *vs.* Targee, 7 *Wend.*, 358.

But the Court should always listen to reasons offered for not making such disclosure. *Ib.*

<sup>2</sup>Beal *vs.* Finch, 11 *N. Y.*, 128, 135.  
Brown *vs.* Richardson, 20 *id.*, 472.

It was expressly held in *Haussknecht vs.* Claypool, 1 *Black*, 431, that it is not essential to state that the witness is a material witness, though to do so is more in conformity with the usual practice (see 1 *Black*, 435, where judgment was reversed for error in exclusion).

[*Contra*, *Stewart vs.* Kirk, 69 *Ill.*, 509.

And see *Railroad Company vs.* Smith, 21 *Wall.*, 255, 261.

*Louisville, etc., R. R. Co. vs.* Sullivan, 5 *Ky. L. Rep. & J.*, 722.]

4. — *before putting question.*—If a question calls for evidence which may or may not be relevant or material, the adverse party may require that counsel state the substance of what he proposes to prove,<sup>1</sup> and if he refuse to do so the question may be excluded.<sup>2</sup>

But this rule does not apply to strict cross-examination.<sup>3</sup>

- <sup>1</sup>*First Baptist Church vs. Brooklyn Fire Ins. Co.*, 23 *How. Pr.*, 448, 450, affirmed on the merits, 28 *N. Y.*, 153.  
*United States vs. Gibert*, 2 *Sumn.*, 19.  
*Fairchild vs. Case*, 24 *Wend.*, 380.  
*Morgan vs. Browne*. 71 *Penn. St.*, 130, 136.

<sup>2</sup>Same cases.

- <sup>3</sup>*O'Donnell vs. Segar*, 25 *Mich.*, 367, 372.  
*Martin vs. Elden*, 32 *Ohio St.*, 282.  
*Batten vs. State*, 80 *Ind.*, 394; s. c., 7 *Weekly Cin. L. B.*, p. 125 of *Supp.*  
*Stanton Co. vs. Canfield*, 2 *Nebr.*, 28; s. c., 6 *Northw. Rep.*, 466.  
 [Contra, *U. S. vs. Gilbert*, 2 *Sumn.*, 19. STORY, J.]

5. *Offer of document.*—Under a general offer of a document and its reception in evidence without objection or qualification, the whole document is deemed in evidence, for all purposes;<sup>1</sup> and including indorsements thereon such as may be deemed connected with the contents.<sup>2</sup>

- <sup>1</sup>*Miles vs. Loomis*, 75 *N. Y.*, 285; s. c., 31 *Am. R.*, 470; aff'g 10 *Hun*, 372.

Hence the party who so introduced it cannot impeach any part of it.

- Machlin vs. New Engl. Life Ins. Co.*, 33 *La. Ann.*, 801; s. c., 12 *Rep.*, 657.  
*Hewett vs. Buck*, 17 *Me.*, 147; s. c., 35 *Am. Dec.*, 243.

- <sup>2</sup>*Bell vs. Keefe*, 12 *La. Ann.*, 340.

6. — *of part of series or complex document.*—Under an offer of a particular document forming an integral part of a complex document, produced entire, and its reception without objection or qualification,—such as an offer and reception of a notary's protest without mentioning a certificate of notice attached thereto, or an offer and reception of a pleading contained in a judg-

ment roll, produced without mentioning the judgment, etc.,—the particular document offered is alone deemed in evidence for the party offering it,<sup>1</sup> subject, however, to the right of the adverse party to read the other connected papers (but so far only as they qualify the paper offered),<sup>2</sup> if their genuineness appears, or if it was assumed by the offer.

<sup>1</sup>*Marchand vs. Coffee*, 23 *La. Ann.*, 442.

<sup>2</sup>*Abbott vs. Pearson*, 130 *Mass.*, 191.

7. *Necessity of promise to connect.*—He who offers evidence, the competency of which depends upon other evidence being given to establish it, must make it appear that it will be competent by stating what he expects to prove, and if he does not do so when objection is made, it is not error to exclude the evidence.

*Mechelke vs. Bremar*, 59 *Wisc.*, 57; s. c., 17 *Northw. R.*, 682.

*Piper vs. White*, 56 *Penn. St.*, 90.

*Hall vs. Patterson*, 51 *id.*, 289.

*Bilberry's admr. vs. Mobley*, 21 *Ala.*, 277.

*Van Buren vs. Wells*, 19 *Wend.*, 202.

*Abney vs. Kingsland*, 10 *Ala.*, 355; s. c., 44 *Am. Dec.*, 491, and *cas. cit.*

*Carnes vs. Platt*, 15 *Abb. Pr., N. S.*, 337; s. c., 36 *Super. Ct. (J. & S.)*, 361; *aff'd* in 56 *N. Y.*, 405.

8. *Opening the door for the adversary,—by error, without objection.*—Where irrelevant evidence has been received with out objection, it is not error to allow the adverse party to give evidence to meet it.<sup>1</sup> So if one party introduce evidence upon a point immaterial as matter of law, but not objected to as immaterial, the other side may be allowed to rebut it.<sup>2</sup>

Yet, on the other hand, it is not error to refuse to receive equally irrelevant evidence to meet it,<sup>3</sup> except where the evidence received gave a right to contradict for purpose of impeachment, or was calculated to make an impression on the jury which instructions from the

Court could not efface,<sup>4</sup> and which the offered evidence tends to remove.

<sup>1</sup> *Blossom vs. Barrett*, 37 *N. Y.*, 434 438.

*Havis vs. Taylor*, 13 *Ala.*, 324.

*Hale vs. Philbrick*, 47 *Iowa*, 217; *mem. s. c.*, 7 *Rep.*, 717.

But the practice disapproved, and held not error to exclude such evidence, *Walkup vs. Pratt*, 5 *Har. & J. (Md.)*, 51.

The giving of an incompetent kind of evidence,—such as oral, to vary written,—is a waiver of the right to object to the adversary's doing likewise.

*Shaw vs. Stone*, 1 *Cush. (Mass.)*, 228, 243.

<sup>2</sup> *Waldron vs. Romaine*, 22 *N. Y.*, 368, 371.

*Furbush vs. Goodwin*, 25 *N. H. (5 Fost.)*, 425.

*Weiting vs. Shearer*, 8 *Weekly Dig.*, 392.

*Findley vs. Pruitt*, 9 *Port. (Ala.)*, 195.

*Patton vs. Cities of Phil. & N. O.*, 1 *La. Ann.*, 98.

*s. p.*, recognized in *Scattergood vs. Wood*, 79 *N. Y.*, 263; *s. c.*, 35 *Am. R.*, 515.

So if a party who, while testifying in his own behalf, volunteers an irrelevant statement, no question on the point being asked, it is not error to receive contrary evidence from the other party.

*Brown vs. Perkins*, 1 *Allen (Mass.)*, 89, 96.

"The defendant opened the door for the testimony and cannot complain that it was not closed soon enough to suit him."

*Sherwood vs. Titman*, 55 *Penn. St.*, 77.

[*Contra*, *Mitchell vs. Sellman*, 5 *Md.*, 376.]

This is not error, even though allowed as independent testimony, not merely by way of contradiction.

*Sherwood vs. Titman*, 55 *Penn. St.*, 77.

[*Contra*, *McCartney vs. Nebraska*, 1 *Nebr.*, 121.]

<sup>3</sup> *Farmers & Manfrs. Bk. vs. Whinfield*, 24 *Wend.*, 419.

*Stringer vs. Young*, 3 *Pet.*, 320, 337.

*Phila. & Trenton R. R. Co. vs. Stimpson*, 14 *id.*, 448.

*Manning vs. Burlington, etc., R. R. Co. (Iowa)*, 1884), 20 *Northw. Rep.*, *N. S.*, 169.

[*Contra*, *Thompson vs. Brothers*, 5 *La.*, 279.]

A party has not the right to give immaterial evidence, because his adversary has done so before him.

(*Per FOLGER*, Ch. J.) *People vs. Dowling*, 84 *N. Y.*, 478, 486.

<sup>4</sup>*Wallis vs. Randall*, 81 N. Y., 164, 167; aff'g 16 Hun, 33.  
And see *Stringer vs. Young*, 3 Pet., 320, 337.  
s. P., *Scales vs. Shackleford*, 64 Geo., 170.

9. — *by offer or challenge*.—An offer to allow the other party to prove that which might be objected to under the pleadings,<sup>1</sup> or a challenge to him to do so,<sup>2</sup> followed by a responsive offer of such proof, is a waiver of the right to object.

<sup>1</sup>*Adams vs. Farnsworth*, 15 Gray (Mass.), 423, 426.

<sup>2</sup>*Rundell vs. Butler*, 10 Wend., 119.

10. *Opening the door for one's self*.—A party who puts in illegal evidence not objected to by the other party cannot complain that he is not allowed to follow it with other such evidence,<sup>1</sup> even to confirm<sup>2</sup> or explain it.<sup>3</sup>

<sup>1</sup>*Lyons vs. Teal*, 28 La. Ann., 592.

<sup>2</sup>*Trenton Mut. Life & F. Ins. Co. vs. Johnson*, 24 N. J. L. (4 Zab.), 576, 579.

<sup>3</sup>*Brand vs. Longstreet*, 4 N. J. L. (1 South.), 325.

11. *Opening the door for adversary;—by error, against objection*.—Where improper evidence has been received against objection and exception, the refusal to receive contrary evidence on the same point is error, which will not be disregarded by the appellate court, unless they can see that the improper evidence could not have influenced the jury.

*Ward vs. Washington Ins. Co.*, 6 Bosw., 229.

An unequal application of the rules of evidence which might have prejudiced the case, such as allowing opinion evidence offered by one party and excluding evidence of the same character on the same point offered by the other, is ground of reversal.

*Holten vs. Holten*, 5 Weekly Dig., 14.

12. *Retracting*.—If a party, after causing a witness to be sworn, or a deposition to be taken, refuses to

examine the witness or read the deposition, the other party has the right to do so, but the evidence which the latter adduces by so doing will be his own, within the rule forbidding him to impeach it.<sup>1</sup>

One who has put a question has a right to withdraw it before any answer is given.

<sup>1</sup> *Musick vs. Ray*, 3 *Metc. (Ky.)*, 427 (where a party refused to read his own cross-examination in a deposition, and the Court, after allowing the adverse party to read it, allowed him also to contradict it; and this was held error).

13. *Right to call for ground of objection.*—A party whose evidence is objected to may require the grounds of objection to be specified in detail, sufficiently to enable him to remedy it, if remediable.

*Milliken vs. Barr*, 7 *Penn. St.*, 23.

*Harris vs. Panama R. R. Co.*, 5 *Bosw.*, 312.

Where, as in Pennsylvania, a general objection is sufficient unless particularity is called for (*Penn. Mut. Aid Soc. vs. Corley*, 39 *Leg. Int.*, 139; s. c., 11 *Ins. L. J.*, 493), the policy of counsel is to call for the ground. Otherwise, often in those jurisdictions where a general objection does not avail, in error or on appeal, if the ground of the objection is such that it could have been obviated had it been disclosed.

14. *Cross-examining as to competency.*—When objection to the competency of evidence arises upon the examination of a witness, the objector has a right to interpose with cross-examination upon the facts material to the question of competency.

*First Nat. Bk. of Easton vs. Wirebach*, 14 *Rep.*, 606; s. c., more fully, 12 *Weekly N. C.*, 150 (expert witness; held error to refuse such preliminary cross-examination).

s. p., *Maurice vs. Worden*, 54 *Md.*, 233.

*Trussell vs. Scarlett*, 18 *Fed. Rep.*, 217, note.

15. — *counter proof.*—On an objection to the competency, either of testimony or a document, the Court



may allow the objector to interpose with other evidence upon the facts material to it;<sup>1</sup> or, if the question be identical with one in issue, and a *prima facie* case of competency is made out by the party offering the evidence, the Court may (after allowing cross-examination, if the proposed evidence be testimony, or a document introduced by testimony) receive the evidence, subject to the right of the adverse party to move to strike it out and have the jury instructed to disregard it, if he shall in due course rebut the apparent competency.

<sup>1</sup>*Maurice vs. Worden*, 54 *Md.*, 233 (so held notwithstanding an express rule of Court giving plaintiff the opening).

*Trussell vs. Scarlett*, 18 *Fed. Rep.*, 214.

*Commonwealth vs. Howe*, 9 *Gray*, 110 (holding that when a judge hears evidence on a question preliminary, he should hear all, even though it be a question which more properly should go to the jury).

[*Contra*, *Verzan vs. McGregor*, 23 *Cal.*, 339; holding it error to receive counter-proof on the competency of a document before allowing it to be read to the jury. To the same effect, though conceding the tendency to confuse the jury by not allowing it, is *Crenshaw vs. Jackson*, 6 *Geo.*, 509; s. c., 50 *Am. Dec.*, 361.]

The true rule is, that it is in the sound discretion of the Court to pursue either course, as stated in the text.

16: — *arguing*.—When a question of the admissibility of evidence is duly raised, the party have a right to be heard in argument. But a refusal of the right of argument is not error, if the ruling though without argument be correct.<sup>1</sup> The Court may, in its discretion, hear the argument in the presence<sup>2</sup> or in the absence of the jury.

<sup>1</sup>*Olive vs. State of Nebraska*, 11 *Nebr.*, 1; s. c., 7 *Northw. Rep.*, foot page, 451.

<sup>2</sup>*State vs. Wood*, 53 *N. H.*, 484.

## VIII.—RULING ON OFFERS AND OBJECTIONS.

[A statement of objection not indicating its ground is not sufficient to require exclusion, unless the objection be of such a nature that it could not be obviated, or it appear that the party making the offer could not have avoided the ground of objection had it been specifically stated.]

But it is not error to sustain such a general objection if any sufficient ground for it exists, provided that no request be made that the ground be specified].

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1. Questions, how tried.

2. Conditional admission.

3. Objections—authorities in support of strict rules.

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1. *Questions, how tried.*—Whether evidence is admissible or not is a question of law for the Court;<sup>1</sup> and questions of fact incidental to its determination are also for the Court to determine for that purpose,<sup>2</sup> even where they are identical with questions at issue for the jury to pass on.<sup>3</sup>

If the incidental question be in doubt when the evidence is offered, the judge may decide it on the evidence as it then stands;<sup>4</sup> or, if the question be identical with one in issue, may admit the evidence if it be such that the jury might rationally infer the fact, and leave to them the question what influence it should have, with proper instructions as to the doubt respecting its competency.<sup>5</sup>

<sup>1</sup>Columbian Ins. Co. *vs.* Lawrence, 2 *Pet.*, 25.

Carter *vs.* Bennett, 4 *Fla.*, 283.

De France *vs.* De France, 34 *Penn. St.*, 385.

Davis *vs.* Charles River Branch R. R. Co., 11 *Cush. (Mass.)*, 506 (question whether a communication was not made by way of compromise and therefore inadmissible. Here it was held error to leave it to the jury).

<sup>2</sup>*Reynolds vs. Lounsbury*, 6 *Hill*, 534 (question whether a witness had an interest that disqualified him).

*Currier vs. Bank of Louisville*, 5 *Coldw. (Tenn.)*, 460 (same question).

*Tabor vs. Stanuels*, 2 *Cal.*, 240 (same question. Here it was held error for the judge to leave the question to the jury).

*Robinson vs. Terry*, 11 *Conn.*, 460 (same question. Here it was held error for the judge to leave the question to the jury).

*Harris vs. Wilson*, 7 *Wend.*, 57 (question whether one whose admission or declaration was sought to be proved, was a partner of him against whom it was offered).

*Cliquot's Champagne*, 3 *Wall.*, 114 (question whether there was sufficient proof of agency to admit the supposed agent's acts and declarations against the principal).

*Jones vs. Tucker*, 41 *N. Y.*, 546 (question whether a witness was competent as an expert).

*First Nat. Bank of Easton vs. Wirebach*, 14 *Rep.*, 606; s. c., more fully, 12 *Weekly N. C.*, 150 (same question).

*Ratliff vs. Huntly*, 5 *Ired. (N. C.) L.*, 545 (question whether there was a writing such as to preclude oral evidence.)

The rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed, applies to the question of preliminary proof to lay a foundation for further evidence or to connect declarations with the party sought to be charged.

*Pleasants vs. Fant*, 22 *Wall.*, 116.

<sup>3</sup>*Scherpf vs. Szadeczky*, 1 *Abb. Pr.*, 366.

*Prall vs. Hinchman*, 6 *Duer*, 351.

*Reynolds vs. Lounsbury*, 6 *Hill*, 534.

*Scovell vs. Kingsley*, 7 *Conn.*, 284.

<sup>4</sup>*Scherpf vs. Szadeczky*, 1 *Abb. Pr.*, 366.

<sup>5</sup>*Verzan vs. McGregor*, 23 *Cal.*, 339 (question whether a memorandum made after signing a contract was part of it).

*Winslow vs. Bailey*, 16 *Me.*, 319 (question whether document was used fraudulently).

*Bartlett vs. Hoyt*, 33 *N. H.*, 151 (question whether a communication was not made by way of compromise, and therefore inadmissible).

*Swearingen vs. Leach*, 7 *B. Mon. (Ky.)*, 285 (agency ; a well-reasoned case).

“A contrary practice would in many instances take the whole case from the jury and subject it to the decision of the judge upon the weight of the evidence, thus destroying the established distinction between their respective functions.” *Ib.*

To exclude the evidence where the preliminary fact was such that a jury might rationally infer it, was held error. *Ib.*

To the same effect, *Funk vs. Kincaid*, 5 *Md.*, 404.

Where the evidence on which the admissibility of the fact depended had already gone to the jury, *held*, error to refuse to submit the other to them also.

*Day vs. Sharp*, 4 *Whart.*, 339; s. c., 34 *Am. Dec.*, 509.

In *Emerson vs. Prov. Hat Mfg. Co.*, 12 *Mass.*, 237; s. c., 7 *Am. Dec.*, 66, it was held that the question of agent's authority to sign, if arising on a writing, was for the Court; if oral, for the jury; but this was because the action was on the contract, and the execution of it was the very question in issue.

The case of *Porter vs. Wilson*, 13 *Penn. St.*, 641, well explains the distinction between such a case and the cases where the fact of authority is only preliminary to evidence on a collateral issue.

2. *Conditional admission.*—It is irregular to allow evidence objected to, to go to the jury, reserving the question of its competency for further consideration,<sup>1</sup> except when allowed in the discretion of the Court upon the assurance of counsel that he will give evidence to connect.

<sup>1</sup>*McCurry vs. Hooper*, 12 *Ala.*, 823; s. c., 46 *Am. Dec.*, 280.

3. *Objections—authorities in support of strict rules.*  
—Whether a trial be long or short, or the exceptions few

or many, every party has the right to demand that he shall not be prejudiced by improper evidence.<sup>1</sup> The admission of illegal evidence which bears in the least degree on the result is fatal.<sup>2</sup>

The graver the charge, the more strictly the rules of evidence should be applied.<sup>3</sup> It is always better and safer for a Court to err in the direction of over-strictness in requiring from counsel adherence to rules.<sup>4</sup>

<sup>1</sup>N. Y. Guaranty & Indemnity Co. vs. Gleason, 7 *Abb. N. Y.*, 334; s. c., 78 *N. Y.*, 503.  
Worrall vs. Parmelee, 1 *id.*, 519, 521.

<sup>2</sup>Baird vs. Gillett, 47 *N. Y.*, 186, 188.

For the laxer rule in equity cases, see *Code Civ. Pro.*, § 1003.

<sup>3</sup>Blackburn vs. Beall, 21 *Md.*, 208.

<sup>4</sup>Green vs. Green, 26 *Mich.*, 437.

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## IX.—EXCEPTIONS.

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|--|-------------------------------------|
| 1. When to be taken.                         | 3. Exception to incidental remarks. |
| 2. Anticipatory note of intended exceptions. |                                     |
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1. *When to be taken.*—To secure the right to review, an exception must be taken at the time when the ruling or instruction objected to is given;<sup>1</sup> and should be then noted,<sup>2</sup> but if seasonably taken, the judge may allow it to be noted before the verdict,<sup>3</sup> but not after verdict.<sup>4</sup>

<sup>1</sup>Turner vs. Yates, 16 *How. (U. S.)*, 14, 29.  
Stewart vs. Huntington Bank, 11 *Serg. & Rawl*, 267; s. c., 14 *Am. Dec.*, 628.

<sup>3</sup>An exception to a ruling on a question of evidence must be taken and reduced to writing, or entered in the minutes at the time the ruling is made.

*N. Y. Code Civ. Pro.*, § 995.

<sup>3</sup>*Hunnicut v. Peyton*, 102 *U. S.* (12 *Otto*), 333, 354.

<sup>4</sup>*U. S. v. Carey*, 110 *U. S.*, 51.

2. *Anticipatory note of intended exceptions.*—A previous reservation of a right to except subsequently is not a sufficient exception.<sup>1</sup> A stipulation of counsel, or a direction by the trial judge to which there is no dissent, that the stenographer should enter an exception to whatever there should be an objection to, does not make a subsequent objection equivalent to an exception; but will entitle an objecting party to have an exception inserted on the settlement of the case.<sup>2</sup>

<sup>1</sup>*Gregory v. Dodge*, 14 *Wend.*, 593; aff'g 4 *Paige*, 557.

<sup>2</sup>*Stephens v. Reynolds*, 6 *N. Y.*, 454.

*Briggs v. Waldron*, 83 *id.*, 582.

3. *Exception to incidental remarks.*—An exception lies to remarks of the judge which are in the nature of instructions to the jury, or calculated to be so understood by them;<sup>1</sup> but not to remarks addressed to counsel in the course of argument or ruling on applications made during the trial.<sup>2</sup>

<sup>1</sup>*Daly v. Byrne*, 77 *N. Y.*, 182; aff'g 43 *Super. Ct. (J. & S.)*, 261.

*Caldwell v. N. Y. Steamboat Co.*, 47 *N. Y.*, 282.

<sup>2</sup>In the latter class of cases the remedy is by motion for new trial.

## X.—WITHDRAWING AND STRIKING OUT EVIDENCE.

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|--|------------------------------------|
| 1. <i>Withdrawing.</i>                                     | 4. — after unsuccessful objection. |
| 2. <i>Moving to strike out — after omitting to object.</i> | 5. <i>Delay in moving.</i>         |
| 3. — after adversary's omission.                           | 6. <i>Power of the Court.</i>      |

1. *Withdrawing.*—One who has adduced evidence against objection, by calling forth a responsive answer or by reading a document, has not a right to withdraw it or have it struck out;<sup>1</sup> but may be allowed, in the discretion of the Court, to withdraw it, although the other party has taken an exception,<sup>2</sup> provided that it be wholly harmless to the other party, and the latter be allowed to have the benefit of it, in his own favor, if he desire.

If it is, or may be, injurious to the party who has excepted, it cannot be withdrawn without his consent, for he has the right to meet it.

<sup>1</sup>*Decker vs. Bryant*, 7 *Barb.*, 182, 189 (ALLEN, J.).

*Furst vs. Second Ave. R. R. Co.*, 72 *N. Y.*, 542, 546

<sup>2</sup>*State of Rhode Island vs. Fowler*, 13 *R. I.*, 661, and cases cited.

*Boone vs. Purnell*, 28 *Md.*, 607.

*Providence Ins. Co. vs. Martin*, 32 *id.*, 310.

Whether the withdrawal will cure the error is often another question.

2. *Moving to strike out—after omitting to object.*—A party who has allowed obviously incompetent evidence to be received without objection is not entitled to have it struck out, but at most to have the jury instructed to disregard it.

*Quin vs. Lloyd*, 41 *N. Y.*, 349, 355 (per WOODRUFF, J., error to strike it out; but the better view is that it is discretionary).

*Marks vs. King*, 64 *N. Y.*, 628; aff'g 1 *Hun*, 435.

*Pontius vs. People*, 82 *N. Y.*, 339; aff'g 21 *Hun*, 328.

*Brockett vs. N. J. Steamboat Co.*, 18 *Fed. Rep.*, 157.

3. — *after adversary's omission.*—One who has drawn out incompetent evidence, even from his own witness, which has been received without exception being taken by his adversary, may be allowed, in the discretion of the Court, to have it struck out<sup>1</sup> before the case is submitted.<sup>2</sup>

<sup>1</sup>*Carpenter vs. Ward*, 30 *N. Y.*, 243, 246 (where the adversary's right to impeach was reserved).

*Roberts vs. Johnson*, 37 *Super. Ct. (J. & S.)*, 157; *aff'd* in 58 *N. Y.*, 613, without distinctly passing on this question: (motion granted, though made after long delay). According to *Lynch vs McNally*, 7 *Daly*, 126, the motion must be immediately made (*aff'd* in 73 *N. Y.*, 347, without passing on the question).

<sup>2</sup>*Farmers' Bk. vs. Cowan*, 2 *Abb. Ct. App. Dec.*, 88.

4. — *after unsuccessful objection.*—A party against whose objection and exception evidence has been received, because apparently competent<sup>1</sup> or upon the faith of a promise to connect,<sup>2</sup> is not, on subsequently establishing its incompetency, or on failure to connect, entitled as matter of right to have it struck out, but only to have the jury instructed to disregard it. But the Court may, in their discretion, grant a motion to strike it out.<sup>3</sup>

<sup>1</sup>*Gawtry vs. Doane*, 51 *N. Y.*, 84; *aff'g* 48 *Barb.*, 148 (notary's certificate afterward shown void by extrinsic evidence).

<sup>2</sup>*Marks vs. King*, 64 *N. Y.*, 628; *aff'g* 1 *Hun*, 435.  
*Platner vs. Platner*, 78 *N. Y.*, 90.

<sup>3</sup>*Stokes vs. Johnson*, 57 *N. Y.*, 673.

The motion ought to be granted where the evidence is so prejudicial that instructions would not remove its effect.

*Anderson vs. Rome, W. & O. R. R. Co.*, 54 *N. Y.*, 334.

*O'Sullivan vs. Roberts*, 39 *Super. Ct. (J. & S.)*, 360.



Or where evidence to meet it has been excluded on the ground that the point is immaterial.  
*Gilbert vs. Cherry*, 57 *Geo.*, 128.

Or where its remaining in is sought to be used as a foundation for further evidence not otherwise admissible.

5. *Delay in moving*.—Omission to object to the evidence at the time is not fatal to a motion to strike it out at any time before the close of the evidence, if the delay is shown to have been from mistake or inadvertence; but the discretion should be carefully exercised, so that no harm may come to the other party.<sup>1</sup> If the motion be not made with reasonable promptitude it is not error to deny it.<sup>2</sup>

<sup>1</sup>*Miller vs. Montgomery*, 78 *N. Y.*, 282, 286; *aff'g* in effect 3 *Redf.*, 154.

<sup>2</sup>*Gilmore vs. Pittsburgh, etc., R. R. Co.*, 104 *Penn. St.*, 275.

6. *Power of the Court*.—Irrelevant evidence may be stricken out by the Court<sup>1</sup> at any stage of the cause;<sup>2</sup> but a party who objected and excepted to its reception, and has been prejudiced by it, still has a right to meet it.<sup>3</sup>

<sup>1</sup>*Montford vs. Rowland*, 11 *Stew. (N. J.)*, 181.

<sup>2</sup>*Maurice vs. Worder*, 54 *Md.* 233, 251.

<sup>3</sup>See, for instance, *Anderson vs. Rome, W. & O. R. R. Co.*, 54 *N. Y.*, 334; and *O'Sullivan vs. Roberts*, 39 *Super. Ct. (J. & S.)*, 360.

# XL—THE USE OF THE PLEADINGS.

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|---|--|
| 1. Reading adversary's pleading.                          | 8. — but adversary may read residue.             |
| 2. — amending.  | 9. Reading one's own pleading,— matter in issue. |
| 3. — original, after amendment.                           | 10. — matter admitted.                           |
| 4. — showing personal sanction.                           | 11. Necessity of putting a pleading in evidence. |
| 5. — contradicting part.                                  | 12. Reading pleadings in another action.         |
| 6. — allegations in verification of adversary's pleading. | 13. Copy not best evidence.                      |
| 7. — mere extract may be read.                            |  |

1. *Reading adversary's pleading*.—The pleading of a party in the action on trial is competent evidence against him of any relevant matter of fact contained therein, and is conclusive,<sup>1</sup> unless the Court allow an amendment. A party whose pleading admits a conclusion of law is not thereby estopped from contesting it.<sup>2</sup>

<sup>1</sup>Cook vs. Barr, 44 N. Y., 156, 158 (EARL, C.).

<sup>2</sup>People ex rel. Purdy vs. Comm'rs of Marlborough, 54 N. Y., 276; s. c., 13 Am. R., 581.

2. — *amending*.—The Court have a discretionary power to refuse to allow a party to amend at the trial by striking out an admission which his adversary relies on, where the applicant does not show that it was made under a mistake of fact.

Miller vs. Moore, 1 E. D. Smith, 739.

Leave to amend may be granted without prejudice to using the admission.

Kenah vs. Steam Tug John Markee, Jr., 3 Fed. Rep., 45; s. c., 14 Reporter, 646.

Strong vs. Dwight, 11 Abb. Pr., N. S., 319.

3. — *original after amendment*.—A pleading or an admission or allegation in a pleading, notwithstanding it has been withdrawn or struck from the record by amendment, is competent in evidence against the party from

whom it proceeded, like any other admission or declaration, subject, however, to explanation by him.

*Strong vs. Dwight*, 11 *Abb. Pr.*, *N. S.*, 319 (where the pleading had been verified by the party personally).

*Frearson vs. Loe*, *L. R.*, 9 *Chan. Div.*, 48, 66 ; s. c., 25 *Moak's Eng.*, 747, 763 (*JESSEL*, *M. R.*).

*Fogg vs. Edwards*, 20 *Hun*, 90.

*Bloomingtondale vs. Du Rell*, 1 *Idaho T.*, 33.

[*Contra*, *Meecham vs. McKay*, 37 *Cal.*, 154, and *Ponce vs. McElvy*, 51 *id.*, 222, reversing judgments for error in admitting the original after amendment ; and *Owens, etc., Mach. Co. vs. Pierce*, 5 *Mo. App.*, 575, holding it not error to exclude it.]

The weight of the evidence is another question. It was justly said in *Elizabethport Mfg. Co. vs. Campbell*, 13 *Abb. Pr.*, 86, that a reference to original will not alone falsify statements of the amended pleading. The *prima facie* effect of amendment is an acknowledgment of mistake, and not an implication of having willfully or knowingly made a false statement.

The rule in the text rests on the general principle that whatever a party has said about his case may be proved against him.

In its application a question remains as to whether he who offers a pleading not signed or verified by the adverse party must give evidence to bring knowledge of it home to him.

According to the considered case of *Vogel vs. Osborne* (*Minn.*, 1884), 20 *Northw. Rep.*, 129, this is necessary, and without such evidence it is error to admit it.

According to *Bowen vs. Powell*, 1 *Lans.*, 1, it would be error to hold that the mere fact that the party had obtained standing in Court by a pleading not signed nor verified by him, nor otherwise brought home to him, was evidence of an admission of the truth of all contained in it.

4. — — *showing personal sanction*.—The party may be asked whether he had given the facts to his attorney or counsel, for the purpose of pleading ; because, if the conversation is not called for, this does not violate the rule of privilege.

*Ross-Lewin vs. Redfield*, 68 *N. Y.*, 627.

5. — *contradicting part.*—A party who puts in evidence his adversary's pleading is not thereby estopped from denying or disproving statements contained in it.

*Mott vs. Consumers' Ice Co.*, 73 N. Y., 543.

So held where plaintiff suing a master put in evidence, to show the injury, the answer alleging the act to have been the willful and not negligent act of the servant. *Held*, error to hold plaintiff estopped thereby.

See also *Fogg vs. Edwards*, 20 Hun, 90.

6. — *allegations in verification of adversary's pleading.*—Allegations of agency, etc., in past transactions, contained in the usual affidavit of verification, are not competent evidence of such agency against the party whose pleading is thus verified. without other evidence to connect him therewith.

*Bowen vs. Powell*, 1 Lans., 1.

7. — *mere extract may be read.*—A party may read in evidence a mere extract from his adversary's pleading, however brief, provided he do not omit a part of a sentence or clause which qualifies that part which he reads so as to pervert the sense or render it uncertain.

*McDonald vs. McDonald*, 16 Vt., 630.

*Bompart vs. Lucas*, 32 Mo., 123.

Thus the answer of the defendant may be read in evidence by the plaintiff in an action for conversion to prove possession of the goods by the defendant, even though defendant by his other allegations avers that such possession was lawful by virtue of a purchase of the goods from a person having title thereto, and even though such admission constitutes the only evidence of possession by defendant, and plaintiff relies on other evidence to show the wrongful possession.

*Foster vs. Henry* (N. Y. Com. Pleas, 1872), 5 Alb. L. J., 173.

8. — *but adversary may read residue.*—When one party has read in evidence an extract from his adversary's pleadings the adversary has a right to read as much more

as may be necessary to qualify or explain that which has been read, but not an allegation of a distinct fact in avoidance.

This appears to be the sound rule and in harmony with the general principle as to putting in evidence the whole of the declaration or admission (*Rouse vs. Whited*, 25 N. Y., 170; rev'g 25 Barb., 279), which is properly applicable to written declarations, affidavits, etc., as well as oral.

*Gratton vs. Metrop. Life Ins. Co.*, 92 N. Y., 274, 284.  
*Honstine vs. O'Donnell*, 5 Hun, 472, 474.

It was applied to a pleading in *Goodyear vs. De La Vergne*, 10 id., 537, 539.

The conflict of opinion on this point may be shortly stated as the question; which should prevail, the old common law rule, that when a party has read a portion of a book or other document on his own behalf, the adverse party is entitled to read anything else from the same document; or, the modern rule as to admissions generally, that when a party proves an admission or declaration, the adverse party is entitled to prove as much of the residue as tends to explain or qualify it, but not statements of distinct matters.

The latter I deem to be the true rule applicable to the reading of pleadings as evidence, because they are read simply as admissions; and it is supported by

*Gunn vs. Todd*, 21 Mo., 303.

To the contrary is *Godden vs. Pierson*, 42 Ala., 370, and the head-note in *Gildersleeve vs. Mahony*, 5 Duer, 383, which, however, is not borne out by the decision.

See, further, on the origin of this question, 2 Johns. Ch., 90; 1 Johns., 580; 16 Vt., 634.

#### 9. *Reading one's own pleading,—matter in issue.*—

A party is not entitled to read to the jury, from his own pleading, anything which has been put in issue, except so far as it may be necessarily read to explain a responsive pleading properly in evidence, even though the jury be instructed by the Court that it is not evidence.

The principle is well stated in *Lancaster vs. Arendell*, 2 Heisk. (Tenn.), 434, a case, however, which arose on the reading of a petition for discovery; judgment reversed for error in allowing it to be read even with such instructions.

10. — *matter admitted.*—Material allegations in a complaint which are not put in issue, or in an answer requiring a reply, and admitted by failure to reply, are competent evidence<sup>1</sup> in favor of the party making the allegation, except allegations as to amount of damage.<sup>2</sup>

<sup>1</sup> *Lettick vs. Honnold*, 63 *Ill.*, 335.

<sup>2</sup> *Jennings vs. Astin*, 5 *Duer*, 695; s. c., 3 *Abb. Pr.*, 373 (*dictum*).

The reason of this exception is, that allegations of damage are not admitted by failure to deny.

11. *Necessity of putting a pleading in evidence.*—A pleading even in the same case, which has not been put in evidence, cannot be used as evidence, even against the party who made it;<sup>1</sup> but it may be referred to to define the limits of his case,<sup>2</sup> for a fact admitted by the adversary's pleading need not be proved.<sup>3</sup>

<sup>1</sup> *White vs. Smith*, 46 *N. Y.*, 418, to the contrary, was before a referee.

<sup>2</sup> *Fash vs. Third Ave. R. R. Co.*, 1 *Daly*, 148.

But defining the limits of the case is the province of the Court. *Ib.*

*McKinney vs. Hartman*, 4 *Iowa*, 154.

<sup>3</sup> *Trabue vs. North*, 2 *A. K. Marsh. (Ky.)*, 361.

12. *Reading pleadings in another action.*—The pleading of a party in another action is competent evidence against him of any relevant<sup>1</sup> matter of fact contained therein if it be shown that the matter was inserted with his knowledge and sanction.<sup>2</sup>

<sup>1</sup> *Neudecker vs. Kohlbergh*, 81 *N. Y.*, 296 (holding it error to receive it when not relevant).

<sup>2</sup> *Cook vs. Barr*, 44 *N. Y.*, 156.

Whether his sanction can be presumed from the simple fact that the pleading was put in on his behalf, is questioned. Compare *Vogel vs. Osborne* (*Minn.*, 1884), 20 *Northw. Rep.*, 129, and *cas. cit.*, and note to paragraph 3 (*above*).

13. *Copy not best evidence.*—If a pleading is offered in evidence as an admission of the party, his original, and not a copy or record, is the best evidence.

*Nash vs. Hunt*, 116 *Mass.*, 237, 248.

Whether the original copy served by him on the party offering it would be competent, compare *Pratt vs. Norton*. 5 *Supm. Ct. (T. & C.)*, 8.

2 *Abb. N. Y. Dig.*, new ed., p. 60, § 869, etc.

## XII.—EXHIBITION, AND VIEW.

- |                                 |                          |
|---------------------------------|--------------------------|
| 1. Exhibiting person,—identity. | 8 — application.         |
| 2. — age,—legitimacy.           | 9. — vacating order.     |
| 3. — personal injury.           | 10. — time.              |
| 4. Exhibiting chattel.          | 11. — mode.              |
| 5. — photographs.               | 12. — experiment.        |
| 6. View,—statute.               | 13. — unauthorized view. |
| 7. — object.                    |                          |

1. *Exhibiting person,—identity.*—On the trial of an issue involving the identity of a person, the Court may allow him to be brought before the jury in order that a witness may look upon him and testify.

*Attorney-General vs. Fadden*, 1 *Price*, 403 (where *hab. corp. ad test.* was allowed, to bring him up).

2. — *age,—legitimacy.*—On the trial of an issue involving the age of a child, the Court may allow the child to be shown to the jury.

*N. Y. L.*, 1882, p. 421, c. 340; *Pen. Code*, § 19. In any proceeding, it is matter of right to exhibit the child, on a question of age.

As to legitimacy see *Warlick vs. White*, 76 *N. C.*, 175 (legitimacy of child alleged to be of mixed blood. Refusal to allow it to be exhibited, *held* error).

*State vs. Smith*, 54 *Iowa*, 104; s. c., 6 *Northw. Rep.*, 153 (child of two years or more, alleged to be a bastard, exhibition held not error), disapproved in 22 *Alb. L. J.*, 43.

*Contra*, *State vs. Danforth*, 48 *Iowa*, 43; s. c., 30 *Am. R.*, 387 (error to allow exhibition of child of only three months).

3. — *personal injury*.—The Court may allow a witness testifying in his own behalf respecting injuries to his person, to exhibit the injured part to the jury.<sup>1</sup>

Whether the Court can compel him to do so, or to submit to a medical examination in presence of the jury, is contested.<sup>2</sup>

<sup>1</sup> *Hiller vs. Village of Sharon Springs*, 28 *Hun*, 344.

*Mulhado vs. Brooklyn City R. R. Co.*, 30 *N. Y.*, 370.

*Jordan vs. Bowen*, 46 *Super. Ct. (J. & S.)*, 355.

<sup>2</sup> *Affirmative.*

*Schroeder vs. Chicago, Rock Island, etc., R. R. Co.*, 47 *Iowa*, 375 (a well-reasoned case).

*Miami & Montg. Turnpk. Co. vs. Bailey*, 37 *Ohio St.*, 104; s. c., 6 *Weekly Cin. L. Bul.*, 395.

*White vs. Milwaukee City R. R. Co.*, 61 *Wisc.*, 536; abst. s. c., 24 *Am. L. Reg.*, 150.

*State vs. Ah Chuey*, 14 *Nev.*, 79.

*Hatfield vs. St. Paul & D. R. R. Co. (Minn., 1885)*, 22 *Northw. Rep.*, 176.

And see *State vs. Graham*, 74 *N. C.*, 646;

*Walker vs. State*, 7 *Tex.*, 245; commented on in 15 *Cent. L. J.*, 2, 207;

*Sioux City, etc., R. R. Co. vs. Finlayson*, 16 *Nebr.*, 578; s. c., with note, 49 *Am. R.*, 724.

*Negative.*

*Parker vs. Enslow*, 102 *Ill.*, 272.

*Newman vs. Third Ave. R. R. Co.*, 50 *Super. Ct. (J. & S.)*, 412 (examination before trial).

s. p., *Day vs. State*, 63 *Geo.*, 667.

*People vs. McCoy*, 45 *How. Pr.*, 216 (criminal cases).

4. *Exhibiting chattel*.—On the trial of an issue involving the quality or condition of a chattel, the Court may allow the thing to be shown to the jury, upon proper evidence as to the identity of the thing and of its condition at the time in question.<sup>1</sup>

It is not error to refuse to compel a party to produce a chattel for such examination, even though it be in Court.<sup>2</sup>

<sup>1</sup> *People vs. Muller*, 32 *Hun*, 209; s. c., 2 *N. Y. Crim. R.*, 279 (photographs; on indictment for the sale of them, as deemed obscene).

*Luie vs. Taylor*, 3 *F. & F.*, 731.



King *vs.* New York Central, etc., R. R. Co., 72 *N. Y.*, 607 (iron hook, broken from alleged flaw. In this case some stress was laid on the fact that the question was one of common knowledge as justifying the exhibition of the object).

*s. p.*, People *vs.* Gonzalez, 35 *N. Y.*, 49.

Ruloff's Case, 11 *Abb. Pr.*, *N. S.*, 245; *s. c.*, less fully, as Ruloff *vs.* People, 45 *N. Y.*, 213.

<sup>2</sup>Hunter *vs.* Allen, 35 *Barb.*, 42 (not error to refuse. *Dictum* that it would be error to compel it. But *query*?)

5. — *photographs* — On the trial of an issue involving the condition, appearance, or identity of a person,<sup>1</sup> place,<sup>2</sup> or thing<sup>3</sup> at a previous time, a photograph taken at the time in question is competent upon proper evidence of its fidelity.

<sup>1</sup>Ruloff's Case, 11 *Abb. Pr.*, *N. S.*, 245; *s. c.*, less fully, as Ruloff *vs.* People, 45 *N. Y.*, 213. *S. P.* Cowley Case, 83 *N. Y.*, 405.

<sup>2</sup>Cozzens *vs.* Higgins, 1 *Abb. Ct. App. Dec.*, 451.

<sup>3</sup>Chestnut Hill, etc., Co. *vs.* Piper, etc., Co., 15 *Weekly Notes*, 55 (holding that the fact that the photograph did not show every part of the ground did not require its exclusion).

6. *View*,—*statute*.—The right to send the jury out to have a view, although it may have had a common law origin, is regarded now as statutory, and it is not now the practice to grant a view, except pursuant to an express statute, or by consent.

Whether the *United States Courts* must follow the State practice on applications for view does not appear to have been settled.

If it were a mode of taking evidence the State practice would not be applicable,—see *Exp. Fisk*, 113 *U. S.*, 713, but, doubtless, it still might be allowed on consent, though consent would not make it matter of right. Considered as simply qualifying the jury to understand the evidence, the question whether the State practice controls in the United States Courts depends on the application of the distinction in *Nudd vs. Burrows*, 91 *U. S.* (1 *Otto*), 426.

When view is allowed, they follow the State practice as to expenses.

Huntress *vs.* Town of Epsom, 15 *Fed. Rep.*, 732.

7. — *object.*—A view when had, is to enable the jury to understand the evidence, not to make witnesses of them.

Wright *vs.* Carpenter, 49 *Cal.*, 607.

Close *vs.* Samm, 27 *Iowa*, 503.

Hence it is error to instruct the jury that they are to take into consideration their personal examination, like the evidence. *Ib.*

Here referees, upon the trial, inspected premises (in the presence of counsel) and based their findings upon the proofs, *and such view*,—*Held*, that if such inspection was additional ocular evidence it must appear in the case on appeal, or the appellate Court could not regard it in determining whether the findings were justified by the evidence.

Claffin *vs.* Meyer, 75 *N. Y.*, 260; s. c., 31 *Am. R.*, 467; rev'g 43 *Super. Ct. (J. & S.)*, 1.

Compare Maxted *vs.* Seymour (*Mich.*, 1885), 22 *Northw. Rep.*, 219.

Omaha, etc., R. R. Co. *vs.* Walker (*Nebr.*, 1885), 23 *Northw. Rep.*, 348.

8. — *application.*—It is not error to allow counsel, in arguing his application for a view, to state to the judge in the hearing of the jury what they will see.

Boardman *vs.* Westchester Fire Ins. Co., 54 *Wisc.*, 364.

In Pennsylvania it is held necessary to move before trial.

Bar *vs.* Hoffman, 79 *Penn. St.*, 71.

But participating without objection waives the omission of previous motion.

Brown *vs.* O'Brien, 3 *Clark*, 115.

9. — *vacating order.*—The Court may vacate a previous order for a view upon its appearing unnecessary.

Nesbit *vs.* Kerr, 3 *Yeates*, 194.

10. — *time.*—The time when the jury shall take the view, if it be allowed, is in the discretion of the Court.

Galena, etc., R. R. Co. *vs.* Haslam, 73 *Ill.*, 494.

11. — *mode*.—If a view is demanded in a proper case, the jury should be sent in a body, in charge of a sworn officer.

*Trustees of Brooklyn vs. Patchen*, 8 *Wend.*, 47, 65, 84; *affg* 2 *id.*, 376, 384.

12. — *experiment*.—It is not matter of right to have an experiment tried in the presence of the jury, upon the ground viewed.

*Smith vs. St. Paul City R. R. Co.* (Minn., 1884), 18 *Northw. Rep.*, 827.

But allowing it by consent is not error.

*Stockwell vs. C. C., etc., R. R. Co.*, 43 *Iowa*, 470.

13. — *unauthorized view*.—Misconduct of a juror in going to take a view is waived, if objection to continuing the trial before him is not promptly made, on discovery of the fact.

*Stampofski vs. Steffens*, 79 *Ill.*, 303.

*Whitcher vs. Peacham*, 52 *Vt.*, 242.

### XIII.—USEFUL AUTHORITIES ON EVIDENCE.

[Under this heading, without undertaking to state the law fully, I have briefed a selection of what I deem the most useful authorities on those questions of evidence which are most frequently contested, and are not so trite but that ready reference to authority is often indispensable to correct practice at Circuit.]

*Accounts*.—Account books of a party, the entries in which are testified to be correct by the persons who made them, are competent in his own favor.

*Ætna Ins. Co. vs. Weide*, 9 *Wall.*, 677.

Entries made by private parties are not admissible in evidence, unless they were made contemporaneously with the facts to which they relate, by parties having personal knowledge of the facts; and are corroborated by their testimony if living and

accessible, or by proof of their handwriting, if dead, insane, or beyond reach.

*Chaffee vs. U. S.*, 18 *Wall.*, 516.

And see *Maxwell vs. Wilkinson*, 113 *U. S.*, 656, and *cas. cit.*; *Ocean Nat. Bk. vs. Carll*, 55 *N. Y.*, 440; 9 *Hun.*, 239.

When it is necessary to prove the results of voluminous facts, or of the examination of many books and papers, and the examination cannot conveniently be made in Court, the results may be proved by the person who made the examination.

1 *Greenl. Ev.*, § 93, applied in *Burton vs. Driggs* 20 *Wall.*, 125.

The state of the account and the balance due at a given time, when collaterally involved, provable by the testimony of the person in whose books it was, without production of the books.

*Lewis vs. Palmer*, 28 *N. Y.*, 271, 278.

When complex transactions are already in evidence, statements made by experts of the result of the account, upon the several theories of the law which the case may be subject to, are competent, not necessarily as evidence of the facts stated in them, but to assist the jury in calculation.

*Home Ins. Co. vs. Balt. Warehouse Co.*, 93 *U. S.* (3 *Otto*), 527, 547.

It is not error to refuse to allow a witness with the books before him to give a summary of their contents.

*Von Sachs vs. Kretz*, 72 *N. Y.*, 548, *aff'g* 10 *Hun.*, 95

Entries in books are always explainable, and the truth of the transaction can be shown independent of them.

*Boyce vs. The Patapsco*, 13 *Wall.*, 329.

s. p., *Foster vs. Persch*, 68 *N. Y.*, 400; *rev'g* 6 *Daly*, 164.

*Acknowledgment.*—What defects in an acknowledgment preclude its admission in evidence.

15 *Abb. N. C.*, 269, *note*.

14 *id.*, 453, *note*.

[And see "*Authentication*" (below).]

*Admissions.*—The rule, that what a party has said about his case may always be proved against him, does not let in what he has said merely in the way of repetition of the sayings of others.

*Stephens vs. Vroman*, 16 *N. Y.*, 381.

The rule, that before inconsistent statements can be proved against a witness, his attention must have been called to them with time and place, on cross-examination, does not apply where the witness is a party testifying on his own behalf.

Blossom *vs.* Barrett, 37 *N. Y.*, 434.

Lucas *vs.* Fife, 35 *Iowa*, 9.

— *of what witness would prove.*—An admission of the facts proposed to be proved by an absent witness is conclusive evidence against the party who prevented postponement thereby, if it be read to the jury as a part of the evidence on the trial; otherwise it cannot be considered by them.

Pannell *vs.* State, 29 *Geo.*, 681.

Lowrie *vs.* Verner, 3 *Watts (Pa.)*, 317.

An admission that a witness, if present, would testify to specified statements, is not conclusive, either as to the competency of the witness, nor the admissibility, nor the truth, of the testimony.

State *vs.* Geddis, 42 *Iowa*, 264.

Edmonds *vs.* State, 34 *Ark.*, 720.

Nor is a consent of an adverse party, that such a statement be read to the jury, conclusive as to the truth of the statement.

Burton *vs.* Brooks, 25 *Ark.*, 215.

— *by counsel.*—A formal admission of a material fact<sup>1</sup> made by counsel in the course of the trial of the issues,<sup>2</sup> for the purpose of influencing the course of the trial,<sup>3</sup> is conclusive upon the client<sup>4</sup> for the purposes of the trial,<sup>5</sup> and countervails a contrary allegation or denial in his pleading, but does not supply the lack of an essential allegation or denial in either his or his adversary's pleading.<sup>6</sup>

<sup>1</sup>For instance, the amount due.

Wilson *vs.* Spring, 64 *Ill.*, 14.

Or the fact of partnership.

Oliver *vs.* Bennett, 65 *N. Y.*, 559.

An admission of the law does not necessarily bind the client.

Mitchell *vs.* Cotten, 3 *Fla.*, 134.

Nor does an admission that a *prima facie* case exists.

Spaulding *vs.* Hood, 8 *Cush. (Mass.)*, 602.

<sup>2</sup>An admission of what an absent witness would prove, made before swearing the jury, even though made in their presence, is not enough. It should be presented as part of the evidence.

Lowrie *vs.* Verner, 3 *Watts (Pa.)*, 317.

<sup>3</sup>Usually, it must have been made for the purpose of dispensing with formal proof.

*Treadway vs. Sioux City, etc., R. R. Co.*, 40 *Iowa*, 526.

*Starke vs. Kenan*, 11 *Fla.*, 818.

But an admission made even in the opening, not for the purpose of dispensing with proof by the adversary, but as an avowal of inability or a disavowal of intention to prove, is enough.

*Oscanyan vs. Arms Co.*, 103 *U. S.* (13 *Otto*), 263.

Admissions before trial may be proved (see 3 *Metc. (Ky.)*, 438), their effect depending on circumstances.

<sup>4</sup>Even though she be a married woman.

*Wilson vs. Spring*, 64 *Ill.*, 14.

As to clients who are *non sui juris*, query? "When the rights of infants are in question, the facts cannot be established by admission" (COOLEY, J., in partition); *Claxton vs. Claxton*, 21 *Northw. Rep.*, 311.

According to *Mitchell vs. Cotten*, 3 *Fla.*, 134, it is necessary that the client be present. The rule is qualified by the like intimation in *Colledge vs. Horn*, 3 *Bing.*, 119; but according to Lord Ellenborough, in *Young vs. Wright*, 1 *Camp.*, 139, the authority of attorney or counsel is presumed, and this we take to be the generally recognized rule.

<sup>5</sup>*Oscanyan vs. Arms Co.*, 103 *U. S.* (13 *Otto*), 263.

*Stanley vs. Northw. Mut. Life Ins. Co. (Ind., Nov. 23, 1883)*, 13 *Ins. L. J.*, 347, 353 (95 *Ind.*, 254, appears to be a different decision).

*Thompson vs. Thompson*, 9 *Ind.*, 323.

*Boston, etc., R. R. Co. vs. Dana*, 1 *Gray (Mass.)*, 83.

And see *Arthur vs. Homestead Ins. Co.*, 78 *N. Y.*, 462; s. c., 34 *Am. R.*, 550.

It may affect other trials if in writing.

*Mullin vs. Vt. Mut. Fire Ins. Co.*, 56 *Vt.*, 39; s. c., 13 *Ins. L. J.*, 908.

<sup>6</sup>*Jackson vs. Whedon*, 1 *E. D. Smith*, 141.

The Court may relieve the party from an admission made by his attorney or counsel on the trial, if proper explanation be made.

*Oscanyan vs. Arms Co.*, 103 *U. S.* (13 *Otto*), 263.

s. p., *Behr vs. Conn. Mut. Life Ins. Co.*, 4 *Fed. Rep.*, 357.

But see *People vs. Garcia*, 25 *Cal.*, 531, where it was held not error to refuse to do so.

Compare 13 *Metc. (Mass.)*, 269.

Admission of a distinct fact, though made in the course of a negotiation for settlement, is competent.

*Bartlett vs. Tarbox*, 1 *Abb. Ct. App. Dec.*, 120.

It is not admissible if the statement cannot be separated from the offer and still convey the intended idea.

*Home Ins. Co. vs. Baltimore Warehouse Co.*, 93 *U. S.* (3 *Otto*), 527.

*Affidavits.*—Affidavits *used by the party* in the same cause are not necessarily conclusive as evidence against him on the trial.<sup>1</sup>

An affidavit *made* by the party is conclusive evidence against him in any matter founded upon the proceeding sought to be contradicted or growing out of the adjudication obtained in reliance upon the affidavit, or if it has been acted on by the other party so as to raise an estoppel; otherwise it does not necessarily conclude him.<sup>2</sup>

Affidavits which have been *used against a party* on a former motion are not made admissible in evidence on the trial by the mere fact that he did not make an affidavit in contradiction.<sup>3</sup>

An affidavit of a party *in his own favor* is not made admissible by the mere fact that he has put in evidence the counter affidavit of his adversary.<sup>4</sup>

<sup>1</sup> *Mather vs. Parsons*, 32 *Hun*, 338.

<sup>2</sup> *Maybee vs. Sniffen*, 2 *E. D. Smith*, 1, 12, 14.

<sup>3</sup> *Wehrkamp vs. Willet*, 4 *Abb. Ct. App. Dec.*, 548, 555.

<sup>4</sup> *De Graff vs. Hovey*, 16 *Abb. Pr.*, 120.

*Agency.*—The admissions and declarations of an agent are not evidence of his agency unless brought home to the alleged principal.

*Bacon vs. Johnson* (*Mich.*, 1885), 22 *Northw. Rep.*, 276.

*Stringham vs. St. Nicholas Fire Ins. Co.*, 4 *Abb. Ct. App. Dec.*, 315.

But the Court may in its discretion admit the declarations on assurance that evidence of agency will afterward be given.

*First Unitarian Soc. vs. Faulkner*, 91 *U. S.* (1 *Otto*), 415.

Agency cannot be shown by appearances, except in favor of one who relied on them.

*People vs. Bank of N. A.*, 75 *N. Y.*, 547.

Distinction between conditional authority, and absolute authority subject to limitations peculiarly within the agent's knowledge.

*Merchants' Bank of Canada vs. Griswold*, 72 *N. Y.*, 472; s. c., 28 *Am. R.*, 159.

*Attorney's interest.*—Evidence that plaintiff has agreed to give his attorney a part of the recovery, is incompetent.

*Sussdorf vs. Schmidt*, 55 *N. Y.*, 319.

*Courtright vs. Burns* (*U. S. Circ., W. D., Mo.*, 1882),  
14 *Cent. L. J.*, 89 (opin. by McCrary, J.).

If the attorney is a witness, such evidence is competent on his credibility, and he may be required to answer.

*Moats vs. Rymer*, 18 *W. Va.*, 642; abst. s. c., 25 *Alb. L. J.*, 276.

*Alternative claims.*—Where a party claims premises by two titles, either of which is good if available, he should be permitted to introduce evidence of both.

*Enders vs. Sternbergh*, 2 *Abb. Ct. App. Dec.*, 31 (holding that where a party, having proved title by deed, offered evidence of title to the same property by will, it was error to refuse to admit it, even though the title by deed was uncontroverted).

*Authentication of an act.*—An official authentication of an act, if not necessary to its validity, but simply to facilitate its proof, is not objectionable because made after the action was commenced.

For instance an acknowledgment of a deed.

*Holbrook vs. N. J. Zinc Co.*, 57 *N. Y.*, 616.

Or the seal on letters of administration.

*Maloney vs. Woodin*, 11 *Hun.*, 202.

Thus the formal entry of an order of Court, as actually declared, may be made at any time when necessary for purposes of evidence.

*People vs. Myers*, 2 *Hun.*, 6.

In *Seeley vs. Morgan*, 49 *Super. Ct. (J. & S.)*, 346, this principle was extended to the case of a corporate resolution adopted pending the trial, to evidence a ratification claimed to have been given before the action (reviewing cases).

*Best and secondary evidence.*—The existence of an instrument and the existence of the relation under it may be proved by parol, without producing the instrument.

*Sprague vs. Hosmer*, 82 *N. Y.*, 466, 471.

— contents of a notice may be proved by secondary evidence, without giving notice to produce.

*Eagle Bank vs. Chapin*, 3 *Pick.*, 180, 183.



Original papers are not made merely secondary evidence by record pursuant to a statute requiring them to be filed or recorded.

Chapman *vs.* Gates, 54 *N. Y.*, 132 (County judge's order in highway proceedings).

Haddow *vs.* Lundy, 59 *N. Y.*, 320 (Surrogate's minutes).

The rule excluding secondary evidence does not apply to an incidental and collateral matter drawn out on cross-examination to test the temper and credibility of the witness, and in nowise affecting the merits of the controversy between the parties.

Klein *vs.* Russell, 19 *Wall.*, 439, 464.

Kalk *vs.* Fielding, 50 *Wisc.*, 339.

But a paper, the contents of which are sought to be used to discredit or contradict a witness, as containing his own statements contrary to his testimony, must be produced. A copy will not do.

Newcomb *vs.* Griswold, 24 *N. Y.*, 298.

Pratt *vs.* Norton, 5 *Supm. Ct. (T. & C.)*, 8 (a certified copy assignment in bankruptcy).

s. p., Nash *vs.* Hunt, 116 *Mass.*, 237, 248 (a copy pleading).

The fact that a document is without the State is enough to let in secondary evidence without notice to produce.

Burton *vs.* Driggs, 20 *Wall.*, 125, 134.

Bronson *vs.* Tuthill, 1 *Abb. Ct. App. Dec.*, 206 (*dictum*).

The absence without the State of the instrument on which the action is brought is not an excuse for plaintiff's failure to produce it.

Shillito *vs.* Robbins, 7 *Weekly Cin. L. Bul.*, 74; citing Van Alstyne *vs.* Commercial Bank, 4 *Abb. Ct. App. Dec.*, 449.

— *foundation for secondary: — loss.*—To lay a foundation for secondary evidence of the contents of a lost paper, the person last known to have had its possession must be examined as a witness to prove its loss; and even if he is out of the State his deposition must be taken or excuse shown.

Kearney *vs.* Mayor, etc., of *N. Y.*, 92 *N. Y.*, 617.

— *notice to produce.*—Notice to produce is not necessary in case of a writing directly involved in the cause of action or defense, so that the nature of the action or the contents of the pleading in effect give notice that it will be required.

Howell *vs.* Huyck, 2 *Abb. Ct. App. Dec.*, 423.

Lawson *vs.* Bachman, 81 *N. Y.*, 616; rev'g 44 *Super. Ct. (J. & S.)*, 396.

— — *sufficiency.*—A notice to produce is to be deemed sufficient if it fairly apprise the party of the paper wanted, though it be informal and inaccurate in particulars.

*Frank vs. Manny*, 2 *Daly*, 92.

*Jones vs. Parker*, 20 *N. H.*, 31.

*U. S. vs. Duff* (*C. Ct., So. D. N. Y.*, 1881), 11 *Rep.*, 325 ; s. c., 6 *Fed. Rep.*, 45.

— *quality of secondary evidence, — of lost document.*—Parol evidence to establish the contents of a lost deed should be clear and certain. It should show that the deed was properly executed with all the formalities required by law, and should show all the contents, not literally, but substantially.

*Edwards vs. Noyes*, 65 *N. Y.*, 125.

— — *of suppressed document.*—Parol evidence to establish the contents of an instrument which the adverse party refuses to produce on notice is competent, although vague and indistinct.

*Benjamin vs. Ellinger*, 80 *Ky.*, 472 ; s. c., 4 *Ky. Law Rep.* (*Frankf.*), 317.

— — *of formal document.*—Where the instrument is a familiar legal form,—e. g., a judgment roll or execution—it may be presumed to have been adequate to sustain the official acts by which its existence is proved.

*Mandeville vs. Reynolds*, 68 *N. Y.*, 528, 536 ; aff'g 5 *Hun*, 338.

— *secondary not rebuttable.*—He who, by refusing to produce, lets in secondary evidence, cannot contradict it by parol.

*Bogart vs. Brown*, 5 *Pick.*, 18.

Where, in an action between partners, the defendants, having the books, refused on notice to produce them and put plaintiff to secondary proof,—*Held*, that on rebuttal defendants could not contradict that proof, and the judgment was affirmed by the Court of Appeals after argument on this point.

*Mem. in Platt vs. Platt*, 58 *N. Y.*, 646, 649.

— *destruction.*—The general rule that a party is precluded from proving the contents of a writing by the fact that he destroyed it voluntarily<sup>1</sup> does not apply if it was destroyed by mistake,<sup>2</sup> or, according to his custom, without fraudulent intent, and before any difference had arisen respecting it.<sup>3</sup>

<sup>1</sup>*Blade vs. Nolan*, 12 *Wend.*, 173.

*Renner vs. Bank of Columbia*, 9 *Wheat.*, 581.

*Broadwell vs. Stiles*, 3 *Halst.* (*N. J.*), 58.

<sup>2</sup>*Riggs vs. Tayloe*, 9 *Wheat.*, 483.

<sup>3</sup>*Steele vs. Lord*, 70 *N. Y.*, 80 ; s. c., 26 *Am. R.*, 602.

*Bill of particulars,—as limiting evidence.*—A bill of particulars, even though voluntarily served,<sup>1</sup> has the effect to restrict the proof to the matters set forth in it.<sup>2</sup>

<sup>1</sup>Payne vs. Smith, 19 *Wend.*, 122.

<sup>2</sup>Bowman vs. Earle, 3 *Duer*, 691.

An order to exclude proof for failure to serve a sufficient bill of particulars must be obtained before trial to make exclusion a matter of right.

Whitehall & Plattsburgh R. R. Co. vs. Myers, 16 *Abb. Pr.*, N. S., 34.

s. p., Chesapeake & Ohio Canal Co. vs. Knapp, 9 *Pet.*, 541, 564.

Without an order to exclude proof the judge may in his discretion exclude proof for non-compliance with an order for a bill of particulars.

Bank of U. S. vs. Lyman, 20 *Vt.*, 666 ; s. c., 1 *Blatchf.*, 297.

— *amending.*—Bill of particulars, amendable like a pleading.

Babcock vs. Thompson, 3 *Pick.*, 446.

Melvin vs. Wood, 4 *Abb. Pr.*, N. S., 438.

*Books of science.*—Statements made in books of inductive science, such as standard medical works, are not competent evidence for any purpose.

*California.* Gallagher vs. Market St. R. R. Co. (*Cal.*, 1885), 6 *Pac. C. R.*, 869.

*Illinois.* North Chicago Rolling Mill vs. Monka, 107 *Ill.*, 340 (book on mechanics).

*Indiana.* s. p., Cory vs. Silcox, 6 *Ind.*, 39 (sanctioning use as argument only).

[*Iowa.* Brodhead vs. Wiltse, 35 *Iowa*, 429 (special statute which may admit them).]

[*Kentucky.* Said to have been the practice in some lower courts to receive them. 2 *Ky. L. R. & J.*, 64.]

*Maine.* Ware vs. Ware, 8 *Greenl.*, 42.

*Maryland.* Davis vs. State, 38 *Md.*, 15.

*Massachusetts.* Ashworth vs. Kittridge, 12 *Cush.*, 93 (leading case).

*Michigan.* Pinney vs. Cahill, 48 *Mich.*, 584 ; s. c., with note, 22 *Am. L. Reg.*, 104.

People vs. Hall, 47 *Mich.*, 636 ; s. c., 12 *Northw. Rep.*, 665, 669.

*New York.* Harris vs. Panama R. R. Co., 3 *Bosw.*, 7, 18.

*North Carolina.* Huffman vs. Click, 77 *N. C.*, 55.

*Texas.* Fowler *vs.* Lewis, 25 *Tex. Supp.*, 380 ; cited in 1 *Meyer's Dig.*, 374. (The *Texas* case often cited to the contrary, Wade *vs.* De Witt, 20 *Tex.*, 398, seems to rest on the fact reasonably inferable from the report, that counsel sought to use the extract as argument merely, not as stating facts.)

*Wisconsin.* Stilling *vs.* Town of Thorp, 54 *Wisc.*, 528 ; s. c., 41 *Am. R.*, 60.

Boyle *vs.* State, 57 *Wisc.*, 472 ; s. c., 46 *Am. R.*, 41 ; 15 *Northw. Rep.*, 827 ; 17 *Cent. L. J.*, 91.

[*Contra*, State *vs.* Hoyt, 46 *Conn.*, 333 ; s. c., 38 *Am. R.*, 580, note (but this case can best be sustained as exceptional, and turning on surprise in excluding what had been before permitted).]

The reason is, "they are statements wanting the sanction of an oath ; and the statement thus proposed is made by one not present and not liable to cross-examination" (SHAW, Ch. J.).

Ashworth *vs.* Kittridge, 66 *Mass.* (12 *Cush.*), 193.

— — Almanac admissible to show time of rising of moon.

Munshower *vs.* State, 55 *Md.*, 11 ; s. c., with note, 1 *Cr. L. Mag.*, 320.

State *vs.* Morris, 47 *Conn.*, 179 (justifying it rather as refreshing memory in aid of judicial notice).

A medical expert cannot be allowed to read and thereupon to testify what is in the book,<sup>1</sup> nor can the book be read from to the jury, although the witness testify that he concurs in the views expressed ;<sup>2</sup> but a book which he has cited to sustain his views may be used to discredit him.<sup>3</sup>

<sup>1</sup>Marshall *vs.* Brown, 50 *Mich.*, 148 ; s. c., 15 *Northw. Rep.*, 55.

<sup>2</sup>Commonwealth *vs.* Sturtivant, 117 *Mass.*, 123 ; s. c., 19 *Am. R.*, 401.

<sup>3</sup>City of Ripon *vs.* Bittel, 30 *Wisc.*, 614.

Mr. Moak's art. in 24 *Alb. L. J.*, 268.

Huffman *vs.* Click, 77 *Nor. Car.*, 55, and *cas. cit.*

Otherwise of a book he has not cited.

Knoll *vs.* State, 55 *Wisc.*, 249 ; cited in 59 *Am. Dec.*, 183.

It is not error to refuse to allow a medical witness under cross-examination to be interrogated as to what is in a medical work and then require him to find what he says is there ; for medical books are not admissible in evidence, either for the purpose of sustaining or contradicting a witness.

Davis *vs.* State, 38 *Md.*, 15, 37.

According to *Conn. Mut. Ins. Co. vs. Ellis*, 89 *Ill.*, 516 (and see 107 *Ill.*, 340), the rule against reading to the jury is not violated by reading to an expert under cross-examination to test his knowledge by asking him if he agrees.

— *exact science*.—Books of exact science or mathematical calculations,—such as the Northampton tables and the like,—recognized by the Court as such, or shown to be such by the testimony of a qualified witness, may be read in evidence.

*Abb. Tr. Ev.*, 724.

22 *Am. L. Reg.*, 105 n.

59 *Am. Dec.*, 185 n.

s. p., *Huffman vs. Click*, 77 *N. C.*, 55, 58.

The contrary held of a book on mechanics, in *North Chicago Rolling Mill vs. Monka*, 107 *Ill.*, 340.

— *of history, etc.*—A book published in this country by a private person is not competent evidence against a stranger to it, of facts stated therein of recent occurrence, and which might be proved by living witnesses or other better evidence.

*Whiton vs. Albany, etc., Ins. Co.*, 109 *Mass.*, 24, 31.

*Morris vs. Harmer*, 7 *Pet.*, 554.

*Fuller vs. Princeton*, 2 *Dane's Abr.*, 334.

Otherwise by special statute.

See *Gallagher vs. Market St. R. R. Co.* (*Cal.*, 1885), 6 *Pac. Rep.*, 869.

*Kuhns vs. Chicago, etc., R. R. Co.* (*Iowa*, 1885), 22 *Northw. Rep.*, 661.

*Burden of proof*.—The test as to “the burden of proof,” as to any point, when the phrase is used respecting the order of proof in adducing evidence, is,—which party would be unsuccessful if no evidence at all, or no more than has already been received, were to be offered?

1 *Phil. Ev.*, 812

1 *Tayl. Ev.*, 369, § 338. This subject is well discussed in *Abrath vs. Northeastern R. Co.* (*Eng. Ct. of App.*, June, 1883), 32 *Weekly Rep.*, 56. It is not usually safe to ask the Court, under the same circumstances, to instruct the jury that the burden has shifted. See “XVII. *The Judge's Instructions*” (below).

See also *Lamb vs. Camden & Amboy R. R. & T. Co.*, 46 *N. Y.*, 271, 281; rev'g 2 *Daly*, 454.

*Heineman vs. Heard*, 62 *N. Y.*, 448.

*Banker vs Banker*, 63 *id.*, 409.

— *as to negative.*—In general, whichever party asserts a right must substantiate it; and if the right is dependent upon the existence of a negative, must establish the truth of the negative by a preponderance of proof, unless excused by the fact that the matter is peculiarly within the knowledge of the adverse party.<sup>1</sup> But a party is not required to prove the negative of any matter where the existence of the contrary affirmative is necessary to exempt or discharge the adversary from a duty or liability already proved upon him.<sup>2</sup> He who makes a negative allegation involving a charge of illegality, against which there is a presumption of innocence, must prove the negative.<sup>3</sup>

<sup>1</sup> *Whart. Ev.*, § 357.

1 *Greenl. Ev.*, § 78.

1 *Tayl. Ev.*, 379, § 347.

*Goodwin vs. Smith*, 72 *Ind.*, 113; s. c., 37 *Am. R.*, 141, with note (same note in 25 *Alb. L. J.*, 124) where the application of the rule to a great variety of cases is illustrated.

There are two classes of negatives, definite or specific, and indefinite or universal. An averment that the contract was not performed on a day specified is a definite negative, and it is not objectionable to require proof of a definite negative. An averment that the contract was never performed is indefinite or universal, and it is only of negatives of this class that it is unreasonable to require proof.

<sup>2</sup> *Stark. Ev.*, 589.

*Elkin vs. Jansen*, 13 *Mees. & W.*, 655, 662; s. c., 14 *L. J. Exch.*, 201; 9 *Jur.*, 353.

*Commonwealth vs. Thurlow*, 24 *Pick.*, 374, 381.

“The amount of proof required to support the negative proposition and to shift the burden will vary according to the circumstances of the case; and very slender evidence will often be sufficient to shift the burden to the party having the greatest opportunities of knowledge concerning the fact to be inquired into.”

*Steph. Dig. Ev.*, art. 96.

*U. S. vs. Southern Col. Coal, etc., Co.*, 1 *West Coast Rep.*, 11.

<sup>3</sup> *People ex rel. Smith vs. Pease*, 27 *N. Y.*, 45; s. c., 25 *How. Pr.*, 495; affg 30 *Barb.*, 588.

— *as to fact peculiarly within knowledge of one party.*—Where the subject matter of an allegation is such as to lie pecu-

liarily within the knowledge of the adversary, the burden is on him to give evidence respecting it.

*Tayl. Ev.*, § 347.

1 *Whart.*, § 367.

*Rugley vs. Gill*, 15 *La. Ann.*, 509, and see *Bowman vs. McElroy*, *id.*, 663.

*Corwin vs. Shoup*, 76 *Ill.*, 246.

*Haley vs. Lacey*, 1 *Snow.*, 498.

*Burton vs. Blow*, 23 *Vt.*, 152.

In 43 *Barb.*, 229, JOHNSON, J., states the rule thus: "If the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party." [Citing 1 *Greenl. Ev.*, § 79; 1 *Stark. Ev.*, 362-365; *Wills on Circumstantial Ev.*, 183, 184.] This applies, he says, in all civil cases. But if understood to justify instructing the jury as to the burden of proof, this statement of the rule is too broad. (See reversal in 46 *N. Y.*, 271, 281, of the decision in *Lamb vs. Camden & Amboy R. R. & T. Co.*, 2 *Daly*, 454, where, at page 463, Judge Johnson's opinion was quoted and erroneously applied to sustain instructions to the jury.

— *a legal presumption shifts the burden.*—A presumption of law, arising from evidence already given, or from the pleadings, is sufficient to cast the burden of proof on the other party, to show (if the presumption be disputable), that the fact was otherwise than according to the presumption.

But it will not do to ask the Court to instruct the jury that the burden of proof is shifted, unless the presumption is one of law and the instruction is qualified by the condition that the evidence is believed by the jury. For when the burden of proof is said to shift, all that is meant is that the party from whom it is shifted has a right to go to the jury that they may say whether he has fulfilled his obligation to prove his case, unless the other party takes up the burden of adducing evidence and gives proofs.

*Corporate agent's declarations.*—The declarations made by an officer or agent of a corporation, in response to timely inquiries, properly addressed to him and relating to matters under his charge, in respect to which he is authorized in the usual course of business to give information, may be given in evidence against the corporation.

*Abb. Tr. Ev.*, 44.

*Xenia Bank vs. Stewart*, 114 *U. S.*, 224, 229.

### XIII.—USEFUL AUTHORITIES ON EVIDENCE—*Continued.* 87

— *business*.—The Court may take judicial notice of the ordinary course and usages of business of corporations.

*Isaacson vs. N. Y. Central, etc., R. R. Co.*, 94 *N. Y.*, 278; rev'g 25 *Hun*, 350 (carriers' usage as to checking through baggage).

*Slater vs. Jewett*, 85 *N. Y.*, 61; s. c., 39 *Am. R.*, 627 (supervising trains by telegraph).

*Eaton Cole & B. Co. vs. Avery*, 83 *N. Y.*, 31; s. c., 38 *Am. R.*, 389; aff'g 18 *Hun*, 44.

*Merchants' Nat'l Bank of Whitehall vs. Hall*, 83 *N. Y.*, 383; s. c., 38 *Am. R.*, 434; aff'g 18 *Hun*, 176 (practice of banks).

*Macullar vs. McKinley*, 49 *Super. Ct. (J. & S.)*, 5 (business and functions of mercantile agencies).

— *deed*.—Where the common seal of a corporation appears to be affixed to an instrument, and the signature of the proper officer is proved, there is a legal presumption that the officer did not exceed his authority, and the contrary must be proved by the objecting party.

*Trustees of Canandarque Acad. vs. McKechnie*, 90 *N. Y.*, 618.

s. p., *Belden vs. Meeker*, 47 *id.*, 307.

*Date*.—The date of a document is *prima facie* evidence of the time when it was written.

*Livingston vs. Arnoux*, 56 *N. Y.*, 507, 519; aff'g 15 *Abb. Pr.*, *N. S.*, 158.

The date of a private instrument unauthenticated is not alone presumptive evidence of the time the document was written, as against a stranger to it, when its competency depends on the time it was written.

*Foster vs. Beals*, 21 *N. Y.*, 247, 250.

*Deposition—right to read*.—An objection to the reading of a deposition on the ground of an irregularity or defect which might have been obviated by retaking it, cannot be raised at the trial, unless noted when the deposition is taken, or presented by a motion to suppress before the trial is begun.

*Doan vs. Glenn*, 21 *Wall.*, 33, and cas. cit.

*Hebbard vs. Haughian*, 70 *N. Y.*, 54.

*Fassin vs. Hubbard*, 55 *N. Y.*, 465.

*Wright vs. Cabott*, 89 *N. Y.*, 570.

So also of the refusal of a witness to answer proper questions.

*Sturm vs. Atlantic Mut. Ins. Co.*, 63 *N. Y.*, 77.

As to document annexed to deposition, see 9 *Abb. N. C.*, 65 *note*.



A deposition taken conditionally within the State cannot be read if the personal attendance of the witness can be secured; one taken without the State can be read notwithstanding the presence of the witness, unless it has been suppressed by order on special motion.

Hedges *vs.* Williams, 33 *Hun*, 546.

To show inability to have witness present, the fact of letters having been received from him from places without the State shortly before the trial is competent.<sup>1</sup> So are his declarations, in response to inquiry for the purpose, that he is too unwell to attend.<sup>2</sup>

<sup>1</sup>Carman *vs.* Kelly, 5 *Hun*, 283.

<sup>2</sup>McArthur *vs.* Soule, *Id.*, 63.

— *reading part.*—He who causes a deposition to be taken, even though it be his own testimony, may read part; but whatever he omits that is relevant and competent, may be read by the adverse party.

Gellatly *vs.* Lowery, 6 *Bosw.*, 113.

[*Contra*, Southwark Ins. Co. *vs.* Knight, 6 *Whart.*, 327.]

So it was held in Railw. Assur. Co. *vs.* Warner, 1 *Supm. Ct. (T. & C.)*, *addn.* 21, that an adverse party who calls out, by a cross-interrogatory, material evidence, is entitled to have it read so far as responsive.

*Document.*—Neither proving the signature of an instrument, nor marking it for identification, entitles the adverse party to see it, nor to cross-examine on it. It is the offer in evidence which has this effect.

Stiles *vs.* Allen, 5 *Allen (Mass.)*, 320.

If the party proving its execution refuses to show it and allow cross-examination of the witness as to execution, its admission against objection is error.

Union Mfg. Co. *vs.* Byington, 1 *Hun*, 44; s. c., 3 *Supm. Ct. (T. & C.)*, 86.

— *referred to.*—A document having been properly received in evidence, another distinctly referred to and recognized in it may be received without further proof of execution.

Clark *vs.* Mix, 15 *Conn.*, 152.

An oral contract having been proved, an instrument referred to in it as containing some of its terms may be received without further proof of its execution.

Smith *vs.* N. Y. Central, etc., R. R. Co., 4 *Abb. Ct. App. Dec.*, 262.

— *producing on notice.*—If a party produces a document on notice and offers to prove its genuineness, it is error to allow the party who gave the notice to give secondary evidence of contents of the document called for until the one offered has been received in evidence and submitted to the jury.

*Stitt vs. Huidekopers*, 17 *Wall.*, 384, 397.

— *refusal to produce.*—In the Courts of the United States, if a party refuses to produce a document at the trial, pursuant to order made on motion before trial, he may be nonsuited, if plaintiff; and a verdict against him may be directed, if defendant.

*U. S. R. S.*, § 724.

As to the power in the State Courts.

See 82 *N. Y.*, 260, and *cas. cit.*

— *inspecting on notice to produce.*—If a party obtains and inspects a paper by means of notice to produce, has the one who produced it a right to put it in evidence, if relevant?

*Affirmative :*

*Clark vs. Fletcher*, 1 *Allen*, 53, 57 (*BIGELOW*, Ch. J.).

*Lawrence vs. Van Horne*, 1 *Cal.*, 276, 285 (*dictum*).

*Waller vs. Stewart*, 4 *Cranch. C. Ct.*, 532.

*Wharam vs. Routledge*, 5 *Esp.*, 210.

*Wilson vs. Bowie*, 1 *C. & P.*, 10.

*Steph. Dig. Ev.*, art. 138.

The reason assigned for this view is the same which prevents a party who puts a question from excluding from the record a responsive answer, because it is not what he wants,—that otherwise a party could gain the advantage, if any, from his inquiry, without any corresponding obligation.

*Negative :*

*Kenney vs. Clarkson*, 1 *Johns.*, 385, 394 (*dictum*).

*Stalker vs. Gaunt*, 12 *N. Y. Leg. Obs.*, 124 (*dictum*).

*Sayer vs. Kitchen*, 1 *Esp.*, 210.

*Carr vs. Gale*, 3 *Woodb. & M.*, 38.

The negative is followed in practice in the *N. Y.* Courts.

The reason assigned in the reports for the negative view is, that notice to produce is analogous to a bill of discovery where the answer is not evidence for him who makes it, and that to hold the document admissible would tend to drive parties into equity for discovery.

A better justification for it is, that production on notice is not obligatory, and inspection by counsel is not a matter of evidence at all, but a mere preliminary.

A party obtaining an instrument from his adversary by notice to produce, and examining it, cannot examine a witness on it if he will not offer it in evidence.

*Hotchkiss vs. Germania Ins. Co.*, 5 *Hun*, 91.

*Entire conversation or writing.*—The introduction of a part of a conversation<sup>1</sup> or writing<sup>2</sup> renders admissible as much of the remainder as tends to explain or qualify what has been received ; and that is to be deemed a qualification which rebuts and destroys the inference to be derived from, or the use to be made of, the portion put in evidence.

<sup>1</sup> *Rouse vs. Whited*, 25 *N. Y.*, 170.

*Gildersleeve vs. Landon*, 73 *N. Y.*, 609.

<sup>2</sup> *Gratton vs. Metropolitan Life Ins. Co.*, 92 *N. Y.*, 274, 284.

Whether under this rule, proving an interview or communication may let in a subsequent one, if thus connected,—compare (in affirmative), *Nesbit vs. Stringer*, 2 *Duer*, 26 ; (negative), *Downs vs. N. Y. Central, etc., R. R. Co.*, 47 *N. Y.*, 83.

*Examination before trial*—One who has examined his adversary before trial and read the examination at the trial, is not entitled to examine him further as a witness on the same subject, unless excuse or reason therefor is given.

*Wilmont vs. Meserole*, 40 *Super. Ct. (J. & S.)*, 321.

It is within the discretion of the judge to permit further oral examination at the trial.

*Misland vs. Boynton*, 14 *Hun*, 625 ; *aff'd* in 79 *N. Y.*, 630.

If he has not read the examination at the trial he has a right to call him as a witness.

*Berdell vs. Berdell*, 27 *Hun*, 34 ; *s. c.*, 63 *How. Pr.*, 339.

One who has examined his adversary before trial may read a part of his examination as evidence, but cannot be required to read the whole.

*Brooks vs. Baker* (per VAN HOESSEN, J.), 9 *Daly*, 398, 402 ; following *Gellatly vs. Lowery*, 6 *Bosw.*, 113.

When one has read, at the trial, part of his adversary's previous examination, his adversary is not entitled to put the whole examination in evidence, but only the answers which pertain to the same subject, or rather which tend to qualify what has been read.

*Lynde vs. McGregor*, 13 *Allen (Mass.)*, 172.

*Explaining omission of evidence.*—When a party whose good faith in refraining from testifying in his own behalf<sup>1</sup> or calling

as a witness a person shown to be acquainted with the facts, is questioned, he has a right to give evidence explaining his course.

<sup>1</sup> *Woodruff vs. Hurson*, 32 *Barb.*, 557.

So in reference to a Chinese certificate. GREEN, Ch. J., said: "Non-production of a certificate is a circumstance which, if alone and unexplained, may properly be regarded as proof that the person lacking it is one who is prohibited. But its non-production is open to explanation, and the presumption arising from its non-production to contradiction."

Matter of Lee Yip, cited and followed in *In re Ho King*, 14 *Fed. Rep.*, 724.

*Fact after suit brought.*—Under the general issue or any plea which puts the amount of recovery in dispute, a receipt given after the suit was brought may be given in evidence to reduce the amount of recovery.

*Burdell vs. Denig*, 92 *U. S.* (2 *Otto*), 716.

*Feelings.*—Wherever the bodily or mental feelings of an individual are material to be proved, the usual expression of such feelings are original and competent evidence.

*Travellers' Ins. Co. of Chicago vs. Mosley*, 8 *Wall.*, 397.

*Matteson vs. N. Y. Central, etc.*, R. R. Co., 35 *N. Y.*, 487.

*Abb. Tr. Ev.*, 599.

*Fraud.*—Where fraud in the purchase or sale of property is in issue, evidence of other frauds of like character committed by the same parties at or near the same time, is admissible.

*Lincoln vs. Clafin*, 7 *Wall.*, 132, 139.

*Olmsted vs. Hotailing*, 1 *Hill*, 317.

*Handwriting.*—A person who has seen another write his name but once can testify to his handwriting, and he is equally competent, if he has personally communicated with him by letter, although he has never seen him write at all.

*Rogers vs. Ritter*, 12 *Wall.*, 317.

See *Abb. Tr. Ev.*, 393.

*Illegality.*—Not available as a defense unless pleaded.

13 *Abb. N. C.*, 388.

*Impeaching, etc.*—A party cannot impeach his own witness, in the sense of proving him unworthy of credit;<sup>1</sup> but he may show that he was mistaken, and for this purpose may call other witnesses<sup>2</sup> or examine him as to previous statements for the purpose of reconciling or correcting his statements, even though the effect may be unfavorable to his credibility.<sup>3</sup>

<sup>1</sup>Neither by general evidence, nor by proving by other witnesses prior contradictory statements.

Cox vs. Eayres, 55 *Vi.*, 24; s. c., 45 *Am. R.*, 583, and cas. cit.

<sup>2</sup>Swamscot Machine Co. vs. Walker, 22 *N. H.*, 457; s. c., 55 *Am. Dec.*, 172, with note.

<sup>3</sup>Bullard vs. Pearsall, 53 *N. Y.*, 230.  
14 *Abb. N. C.*, 471, note.

If a party is allowed to extend his cross-examination of an adversary's witness beyond the limits of a strict cross-examination the witness becomes *in so far* his own,<sup>1</sup> and he cannot impeach him generally, nor in respect thereto;<sup>2</sup> nor can he put leading questions,<sup>3</sup> unless the judge in his discretion allows them.

<sup>1</sup>People *ex rel.* Phelps vs. Oyer & T. of N. Y., 83 *N. Y.*, 436, 459, and cas. cit.; aff'g 19 *Hun*, 91.  
Jackson vs. Thomas, 2 *Cai.*, 178.

<sup>2</sup>People vs. Moore, 15 *Wend.*, 422.

<sup>3</sup>People *ex rel.* Phelps vs. Oyer & T. of N. Y. (*above*).  
[*Contra*, Moody vs. Rowell, 17 *Pick.*, 490, 499 (Opinion by SHAW, Ch. J.).]

Statements of opinion adverse to the testimony may be proved as well as statements of fact

Schell vs. Plumb, 55 *N. Y.*, 592; aff'g 16 *Abb. Pr.*, 19.

The time to read an inconsistent writing in evidence is not on the cross-examination, when the witness' attention is called to it, but when the cross-examining party comes to offer his own evidence.

Romertze vs. East River Nat. Bk., 49 *N. Y.*, 577; rev'g 2 *Sweeny*, 82.

Former testimony of a witness, read under a stipulation allowing it, cannot be impeached by proving inconsistent statements to which his attention has not been called.

Hubbard vs. Briggs, 31 *N. Y.*, 518, 536.

— *by disparaging questions.*—On cross-examination a witness may be required to answer any questions relating to specific facts which tend to discredit him or to impeach his moral character, even though not relevant to the issue.<sup>1</sup>

But the judge may, in his discretion, exclude such inquiries if not relevant to the issue, and may do so on the objection of the party, without putting the witness to his election.<sup>2</sup>

<sup>1</sup>People *ex rel.* Phelps vs. Oyer and T. of N. Y., 83 *N. Y.*, 436, 460.

<sup>2</sup>Great Western Turnpk. Co. vs. Loomis, 32 *N. Y.*, 127, 138.

*Impression.*—Witness may testify to an impression if it be memory, not if it be mere belief or inference.

3 *Abb. N. C.*, 235.

*Intent.*—A party may testify in his own behalf to his own intent in doing an act<sup>1</sup> or in the use of ambiguous language,<sup>2</sup> where the intent is a question of fact in issue,<sup>3</sup> and not a conclusion of law necessarily inferred from the fact.<sup>4</sup>

<sup>1</sup>*Fish vs. Inhabitants of Chester*, 74 *Mass.* (8 *Gray*), 506 (intent as to residence or domicile).

*Hulett vs. Hulett*, 37 *Vt.*, 581, 586 (*the same*).

*Danforth vs. Carter*, 4 *Iowa*, 230 (intent to give credit to defendant).

*Sweet vs. Tuttle*, 14 *N. Y.*, 465.

*Abb. Tr. Ev.*, 265 (intent of payment).

*Yerkes vs. Salomon*, 11 *Hun.*, 471 (wager contract).

*Cortland Co. vs. Herkimer Co.*, 44 *N. Y.*, 22 (good faith of an official act).

*People vs. Baker*, 96 *N. Y.*, 340 (false pretences).

<sup>2</sup>*Mickey vs. Burlington Ins. Co.*, 35 *Iowa*, 174 (meaning of an affidavit).

1 *Greenl. Ev.*, § 462, n. 1.

Not, however, where the witness was the mere draftsman, and the object is to interpret the right or obligation arising on the instrument.

*Nevius vs. Dunlap*, 33 *N. Y.*, 676.

<sup>3</sup>So held of the absence of intent to defraud in making an assignment.

*Seymour vs. Wilson*, 14 *N. Y.*, 567 (the leading case; judgment reversed for excluding the question).

*Starin vs. Kelly*, 88 *N. Y.*, 318, and *cas. cit.*

*McKown vs. Hunter*, 30 *N. Y.*, 625 (good faith in prosecution).

<sup>4</sup>*Fiedler vs. Darrin*, 50 *N. Y.*, 437 (usury).

*Lawyer vs. Loomis*, 3 *Supm. Ct. (T. & C.)*, 393 (malice in prosecution without cause).

A party cannot testify in his own behalf to his undisclosed intent in order to alter the effect of that which was matter of contract,<sup>1</sup> representation<sup>2</sup> or estoppel on which the other party had a right to rely.

<sup>1</sup>*Dillon vs. Anderson*, 43 *N. Y.*, 231.

*Craighead vs. Peterson*, 72 *N. Y.*, 279; s. c., 28 *Am. R.*, 150.

<sup>2</sup>*Ballard vs. Lockwood*, 1 *Daly*, 158.

*Waugh vs. Fielding*, 48 *N. Y.*, 681 (deceit).

Where it is necessary to prove concurrence of intent,—as in an illegal agreement,—the intent of each person may be proved by independent evidence; and evidence which shows the intent of

one person is not incompetent, merely because it is no evidence of the intent of the other, provided appropriate evidence of the intent of the other be given in due course.

*Abb. Tr. Ev.*, 739, note 5.

*Yerkes vs. Saloman*, 11 *Hun*, 471.

*Intent of a transaction.*—The purpose or policy of an act may be stated by a witness who was present and cognizant of the whole transaction,—as whether the delivery of money by one man to another was by way of payment or otherwise.

*Nat. Bank of the Metropolis vs. Kennedy*, 17 *Wall.*, 19, 29.

*Interrogating to discover other witnesses.*—Counsel has not an absolute right to interrogate his own witness merely for the sake of ascertaining the name of a person whom he may wish to call as a witness, when the name is not relevant to the issue, but is merely sought by way of discovery to enable him to make inquiry out of court or to subpoena a person as a witness. But in strict cross-examination, where great latitude is allowed, without being limited to matters relevant to the issue, questions which may have this object are not improper if not improper on other grounds.

14 *Abb. N. C.*, 470, note.

*Jurisdictional facts—inferior Court or statutory proceeding.*—Recitals of the necessary jurisdictional facts in a judgment of a Court of inferior jurisdiction, or in a special statutory proceeding, are sufficient *prima facie* evidence of jurisdiction.<sup>1</sup>

If jurisdictional facts do not appear in such a record, extrinsic evidence is competent to supply the defect,<sup>2</sup> but the presumption that public officers have discharged their duty<sup>3</sup> does not supply the defect.<sup>4</sup>

<sup>1</sup>*Agricultural Ins. Co. vs. Bernard*, 14 *Abb. N. C.*, 502; s. c., 96 *N. Y.*, 526; rev'g 26 *Hun*, 602.

*Wright vs. Nostrand*, 94 *N. Y.*, 31; rev'g 47 *Super. Ct. (J. & S.)*, 441.

<sup>2</sup>*Van Deusen vs. Sweet*, 51 *N. Y.*, 378.

<sup>3</sup>See, in support of this presumption, *Mandeville vs. Reynolds*, 68 *N. Y.*, 528; aff'g 5 *Hun*, 338.

*Miller vs. Brown*, 56 *N. Y.*, 383.

<sup>4</sup>*Galpin vs. Page*, 18 *Wall.*, 350.

*Settlemeier vs. Sullivan*, 97 *U. S. (7 Otto)*, 447.

— *court of general jurisdiction.*—In support of the judgment of a superior Court of general jurisdiction, proceeding according to the due course of common law, the jurisdictional facts are presumed, in respect to parties within the territorial limits of the jurisdiction, if the record is silent. But if the record states an insufficient fact it is not aided by presumption.

*Dayton vs. Johnson*, 69 *N. Y.*, 419.

And this presumption applies as against infants as well as others.

*Bosworth vs. Vandewalker*, 53 *N. Y.*, 597.

*Law of other jurisdictions.*—The rule that foreign law must be averred and proved as matter of fact applies to the laws of sister States, when involved in a cause in a State Court;<sup>1</sup> and in the absence of averment or proof, the presumption is that in a State or nation where the common law prevails the common law rules are the same as those of the forum,<sup>2</sup> but not that the statutes are.<sup>3</sup>

<sup>1</sup>See *People ex rel. Lawrence vs. Brady*, 56 *N. Y.*, 182.

<sup>2</sup>*Savage vs. O'Neil*, 44 *N. Y.*, 298.

*People ex rel. Lawrence vs. Brady* (*above*).

First Nat'l B'k of Meadville *vs.* Fourth Nat'l B'k of *N. Y.*, 77 *N. Y.*, 320; *rev'g* 16 *Hun*, 332.

And see *Waldron vs. Ritchings*, 7 *Abb. Pr., N. S.*, 359; *s. c.*, 3 *Daly*, 288; see also 19 *Cent. L. J.*, 242.

<sup>3</sup>*Graves vs. Cameron*, 9 *Daly*, 152.

*Leonard vs. Columbia Steamboat Co.*, 84 *N. Y.*, 48; *s. c.*, 38 *Am. R.*, 491.

The common law is not presumed to exist in another State except in the absence of statutory provisions on the subject.

*Moore vs. Hegeman*, 92 *N. Y.*, 521; *aff'g* 27 *Hun*, 68.

*Hynes vs. McDermott*, 82 *N. Y.*, 41; *s. c.*, 37 *Am. R.*, 538.

As to mode of proof of foreign law, see

*Abb. Tr. Ev.*, 22, 23.

*Ennis vs. Smith*, 14 *How. (U. S.)*, 400; *s. c.*, with note, in 55 *U. S. Supm. Ct. R. (Law ed.)*, 473.

The United States Courts are bound to take judicial notice of the jurisprudence and public laws of the several States,<sup>1</sup> and of those formerly prevailing in acquired States or Territories.<sup>2</sup>

<sup>1</sup>*Owings vs. Hull*, 9 *Pet.*, 607, 625 (notarial acts).

*Covington Drawbridge Co. vs. Shepherd*, 20 *How. (U. S.)*, 227 (public statutes).

<sup>2</sup>*U. S. vs. Perrot*, 98 *U. S. (8 Otto)*, 428.

They may take judicial notice even of a private act if the State Court could.

*Junction R. R. Co. vs. Bank of Ashland*, 12 *Wall.*, 226.

*Leading questions allowable to one's own witness.*—The judge may in his discretion, allow leading questions to be put on direct or re-direct examination, where the witness is hostile or reluctant, or is in the interest of the other party, or so youthful, ignorant or



infirm as to require the attention to be led; or where his memory has been exhausted without stating some particular, such as a name, which cannot be significantly pointed to by a general inquiry.

14 *Abb. N. C.* 470, note.

*Moody vs. Rowell*, 17 *Pick.*, 490, 498 (SHAW, Ch. J.).  
*Metrop. Bk. vs. Hale*, 28 *Hun*, 341 (witness of adverse feeling).

*Cheney vs. Arnold*, 18 *Barb.*, 434 (witness old and blind).

s. P., *Stratford vs. Sanford*, 9 *Conn.*, 274, 284.

And see *Snyder vs. Snyder*, 50 *Ind.*, 492.

— *sometimes excluded on cross.*—The judge may, in his discretion, refuse to allow leading questions to be put on cross-examination, to a witness who shows a strong interest or bias in favor of the cross-examining party.

*Moody vs. Rowell*, 17 *Pick.*, 490, 498.

*Letters.*—A party may put in evidence a letter containing admissions material to the case without putting in the whole correspondence.

*Barrymore vs. Taylor*, 1 *Esp.*, 326.

*Stone vs. Sanborn*, 104 *Mass.*, 319.

[*Contra*, *Simmons vs. Haas*, 56 *Md.*, 153; s. c., 11 *Rep.*, 840.]

When a document is properly in evidence, the envelope in which it was delivered, and any other paper which accompanied and was delivered in the envelope, is competent as part of the *res gestæ*, not as proof of statements in it, but to show under what cover its contents reached the party.

*U. S. vs. Noelke*, 9 *Rep.*, 505.

*Darling vs. Miller*, 54 *Barb.*, 149.

Letters of an agent through whom business was transacted may be received as part of the *res gestæ*.

*Beaver vs. Taylor*, 1 *Wall.*, 637.

*Rosenstock vs. Tormey*, 32 *Md.*, 169; s. c., 3 *Am. R.*, 125.

*Letterbook.*—A press copy of a letter is not primary evidence against the writer.

*Marsh vs. Hand*, 35 *Md.*, 123.

*King vs. Worthington*, 73 *Ill.*, 161.

*Watkins vs. Paine*, 57 *Geo.*, 50.

*Loss of earnings or income.*—Annual earnings from professional or other personal services may be proved as a basis for

damages in an action for personal injury;<sup>1</sup> but not annual income which includes that arising from capital invested in business and the co-operation of a partner.<sup>2</sup>

<sup>1</sup>*Ehrgott vs. Mayor, etc., of N. Y.*, 96 *N. Y.*, 264; rev'g 66 *How. Pr.*, 61.

*Wade vs. Leroy*, 20 *How. (U. S.)*, 34, 43.

*Nebraska City vs. Campbell*, 2 *Black*, 590.

And see *Bierbach vs. Goodyear Rubber Co.*, 54 *Wisc.*, 208; s. c., 41 *Am. R.*, 19.

<sup>2</sup>*Masterton vs. Village of Mt. Vernon*, 58 *N. Y.*, 391.

*Mailing.*—Evidence that a postpaid notice of protest was duly mailed, by deposit either in the post-office, a government letter box,<sup>1</sup> or the hand of the official letter-carrier on his round,<sup>2</sup> and addressed to another town, is conclusive evidence of its receipt.

<sup>1</sup>*Wynen vs. Schappert*, 6 *Daly*, 558.

<sup>2</sup>*Pearce vs. Langfitt*, 101 *Penn. St.*, 507; abstr. s. c., 28 *Alb. L. J.*, 417.

So also evidence that it was put in due course for mailing is competent.

*Abb. Tr. Ev.*, 434.

Evidence that a letter other than notice of protest was so duly mailed; or that it was deposited where in due course of business it should have been mailed, or received, with evidence of such course of business, is competent to go to the jury, and will sustain a finding of actual receipt, but does not raise a legal presumption thereof.

*Rosenthal vs. Walker*, 111 *U. S.*, 185, 193 (holding this presumption sufficient to let in letter-press copies).

*Austin vs. Holland*, 69 *N. Y.*, 571; s. c., 25 *Am. R.*, 246, with note.

*Howard vs. Daly*, 61 *N. Y.*, 362; s. c., 19 *Am. R.*, 285 (deposit in private letter box).

*U. S. vs. Babcock*, 3 *Dill.*, 566, 571.

*Sullivan vs. Kuykendall (Ky., 1885)*, 13 *Wash. L. Rep.*, 164.

*Abb. Tr. Ev.*, 291.

*Memorandum.*—Papers, not evidence *per se*, but proved to have been true statements of fact at the time they were made, are admissible in connection with the testimony of a witness who made them.

*Ins. Cos. vs. Weides*, 14 *Wall.*, 375, and cas. cit.

A memorandum shown to be correct, taken from lost papers, is evidence of their contents.

*Ætna Ins. Co. vs. Weide*, 9 *Wall.*, 677.

— *used to refresh*.—Anything used to refresh witness' memory adverse counsel may see and cross examine on, but is not bound to put in evidence.

*Abb. Tr. Ev.*, 321.

For the cases in which memoranda can be so used

See *id.* and *Maxwell vs. Wilkinson*, 113 *U. S.*, 658.

*Howard vs. McDonough*, 77 *N. Y.*, 592.

*Memory of one witness aided by another*.—Amount allowed to be proved by testimony of a witness that he once knew it and told it correctly to plaintiff, and testimony of plaintiff to what amount the witness told him.

*Shear vs. Van Dyke*, 10 *Hun*, 528.

*Minutes*.—The minutes of a judge or referee on a former trial cannot be read as evidence of what was there testified, if he be living but testifies that he cannot say they contain the testimony accurately, but may have omitted some things.

*Huff vs. Bennett*, 6 *N. Y.*, 337; aff'g 4 *Sandf.*, 120.

*Motive*.—When the motive of a party or witness in performing a particular act or in making a particular declaration becomes material in a cause, he may himself testify in regard to it.

*Tracy vs. McManus*, 58 *N. Y.*, 257.

*Kerrains vs. People*, 60 *N. Y.*, 221; s. c., 19 *Am. R.*, 159.

And see *Intent (above)*.

*Notary's seal*.—The Court will take judicial notice of the seals of notaries public.

*Pierce vs. Indseth*, 106 *U. S.* (16 *Otto*), 546.

*Official act*.—The presumption is that no official person, acting under oath of office, will do aught against his official duty, or will omit to do aught which his official duty requires to be done.

*Mandeville vs. Reynolds*, 68 *N. Y.*, 528; aff'g 5 *Hun*, 338.

This presumption does not supply proof of a substantive fact.

*U. S. vs. Ross*, 92 *U. S.* (2 *Otto*), 281.

*Oral to vary*.—For the numerous exceptions to the rule excluding oral evidence offered to vary or explain a writing, see

*Abb. Tr. Ev.*, 295.

3 *Abb. N. C.*, 372, note (statutes).

*Juillard vs. Chaffee*, 92 *N. Y.*, 592 (negotiable paper).

*Baldwin vs. Bank of Newburg*, 1 *Wall.*, 234.

*Davis vs. Brown*, 94 *U. S.* (4 *Otto*), 423.

*White vs. National Bank*, 102 *U. S.* (12 *Otto*), 658.

- Van Brunt *vs.* Day, 8 *Abb. N. C.*, 336; s. c., 81 *N. Y.*, 251; rev'g 17 *Hun.*, 176 (collateral stipulation).  
 Stone *vs.* Harmon, 31 *Minn.*, 512; s. c., 19 *Northw. Rep.*, 88 (contract).  
 West *vs.* Smith, 101 *U. S.* (11 *Otto*), 263 (correspondence).  
 Rhodes *vs.* Cleveland Rolling Mill, 17 *Fed. Rep.*, 426 (meaning of expressions).  
 Hitz *vs.* National Met. Bk., 111 *U. S.*, 722 (true amount of consideration in deed).  
 Railroad Co. *vs.* Durant, 95 *U. S.* (5 *Otto*), 576 (object of deed "in trust").  
 Claflin *vs.* Fletcher, 7 *Fed. Rep.*, 851 (real party in interest in judgment).  
 Nash *vs.* Towne, 5 *Wall.*, 689 (surrounding circumstances).  
 Mobile *vs.* Montgomery, etc., R. R. Co., 111 *U. S.*, 584, 591 (allowing evidence that writing did not express the parol agreement, and was not authoritatively delivered).

*Reason for positiveness.*—A witness may be asked why he is confident he is correct; for a reason for the positiveness of relevant knowledge is relevant.

Blackwell *vs.* Hamilton, 47 *Ala.*, *N. S.*, 472.

Angell *vs.* Rosenburgh, 12 *Mich.*, 241, 256.

*Receipt.*—Any terms in a receipt which import a binding contract or stipulation between the parties, are within the rule excluding parol evidence to vary a contract,<sup>1</sup> but that part which is a mere receipt is not.<sup>2</sup>

<sup>1</sup>The Lady Franklin, 8 *Wall.*, 325; s. c., with note, 75 *U. S.* (*Law. ed.*), 455 (words agreeing to account on demand for the thing receipted held not a contract within the rule; so held as between third persons).

Eaton *vs.* Alger, 2 *Abb. Ct. App. Dec.*, 5.

Compare Knoblauch *vs.* Kronschnabel, 18 *Minn.*, 300.

<sup>2</sup>The Lady Franklin, 8 *Wall.*, 325; s. c., with note, 75 *U. S.* (*Law. ed.*), 455.

So held of a bill of lading. *Ib.*

A mere receipt, if not sufficiently explained or contradicted, is conclusive.

Riley *vs.* Mayor, etc., of *N. Y.*, 94 *N. Y.*, 331.

*Reference to third person.*—When a person refers to another for an answer on a particular subject, the answer is, in general, evidence against him.

Duval *vs.* Cowenhoven, 4 *Wend.*, 564.

This rule does not let in statements on a different subject, such as information, given to one who was sent for money<sup>1</sup> or for instructions,<sup>2</sup> not for information.

<sup>1</sup> *Murphy vs. Killinger*, 8 *Wall.*, 480.

<sup>2</sup> *Duval vs. Cowenhoven*, 4 *Wend.*, 564.

It does not let in the results of inquiries made by the third person in consequence of the reference, such as what was entered in the books in his charge.

*Lambert vs. People*, 6 *Abb. N. C.*, 181; s. c., 76 *N. Y.*, 220.

*Relevancy*.—Whatever testimony will assist in showing which party speaks the truth as to any of the issues, is relevant.

*Platner vs. Platner*, 78 *N. Y.*, 90.

*Remote evidence*.—Evidence may be rejected as too remote.

*Xenia Bank vs. Stewart*, 114 *U. S.*, 224, 231, and cas. cit.

*Nicholson vs. Waful*, 70 *N. Y.*, 604; rev'g 6 *Hun.*, 655.

*Res gestæ*.—The rule of the *res gestæ* admits declarations made under the impulse of the occasion, though somewhat separated in time and place, if so woven into it by the circumstances as to receive credit from it.

*Commonwealth vs. Hackett*, 2 *Allen (Mass.)*, 136.

*Insurance Co. vs. Mosley*, 8 *Wall.*, 397 (a leading case, but carrying the rule to the extreme of its usual limits, and not followed to that extent in all the States).

Conversation preceding the act may be admitted.

*Ahern vs. Goodspeed*, 72 *N. Y.*, 108; aff'g 9 *Hun.*, 263.

*Schnicker vs. People*, 88 *N. Y.*, 192.

So may acts and declarations of third persons strangers to the action, as for instance, fellow passengers in a railroad collision.

*Twomley vs. Central Park, etc., R. R. Co.*, 69 *N. Y.*, 158; s. c., 25 *Am. R.*, 162.

*Norwich Transportation Co. vs. Flint*, 13 *Wall.*, 3.

The rule of the *res gestæ* does not admit declarations so separated from the occasion as not to gain credit from the impulse of the exigency, or as to admit the influence of intervening motives.

*Abb. Tr. Ev.*, 588, and cas. cit.

14 *Am. L. Rev.*, 817; 15 *id.*, 71.

*Waldele vs. N. Y. Central, etc., R. R. Co.*, 95 *N. Y.*, 274; s. c., 47 *Am. R.*, 41, 52 (declaration half an hour after the occurrence).

*McDermott vs. Hannibal, etc., R. R. Co.*, 73 *Mo.*, 516; s. c., 39 *Am. R.*, 526.

It does not admit a narrative of a past fact.

First Nat. Bk. *vs.* Ocean Bk., 60 *N. Y.*, 278; s. c., 19 *Am. R.*, 181.

*Statute of frauds.*—Where several papers are relied on they must be connected physically or by reference.

Tallman *vs.* Franklin, 14 *N. Y.*, 584, 588; rev'g 3 *Duer*, 395.

Grafton *vs.* Cummings, 99 *U. S.* (9 *Otto*), 100.

Exceptions to this rule:

Beckwith *vs.* Talbot, 95 *U. S.* (5 *Otto*), 289.

Whether the law of the forum or of the place of contract applies, depends on whether the question is one of title to realty, or, if not, on whether the statute is so expressed as to go to the validity of the contract, or as only forbidding an action.

Marie *vs.* Garrison, 13 *Abb. N. C.*, 214, 299.

*Stenographer's minutes.*—Testimony given on a former trial of the same cause by a witness now deceased or beyond the jurisdiction<sup>1</sup> may be proved by the stenographer's minutes.<sup>2</sup>

<sup>1</sup>For cases on the general rule, see 3 *Abb. N. Y. Dig.*, new ed., 109.

<sup>2</sup>*Stewart vs.* First Nat. Bk., 43 *Mich.*, 257 (no question as to mode of authentication seems to have been made).

So of a deceased witness.

The minutes, though certified by the stenographer, are not competent without further authentication.<sup>1</sup>

Otherwise, where the statute makes them evidence.<sup>2</sup>

<sup>1</sup>*Phares vs.* Barber, 61 *Ill.*, 271, 276 (minor point and facts not stated).

s. p., *Golden Terra Mining Co. vs. Smith*, 2 *Dak.*, 377; s. c., 11 *Northw. Rep.*, 98.

<sup>2</sup>*State vs.* Frederic, 69 *Me.*, 400.

They may be admissible after his death as entries in the course of duty.

Where the stenographer who transcribed the minutes testified that his transcript was absolutely correct, but that he had not compared it,—*Held*, not error to exclude it for want of comparison.

*People vs.* McKinney, 49 *Mich.*, 334 (COOLEY, J., criminal case).

The stenographer's minutes on a former trial cannot be used to impeach the testimony of a witness not a party, without first calling his attention to the matter.

*Seligman vs.* Ten Eyck Estate (*Mich.*, 1884), 18 *Northw. Rep.*, 819.

*Stipulation as to facts.*—A stipulation admitting the facts for the purposes of the trial, does not exclude further evidence, unless so expressed.

*Dillon vs. Cockcroft*, 90 *N. Y.*, 649.

An application to relieve against a stipulation on the ground that the allegations admitted by it were false, must be by special motion. It is not error to refuse to consider the motion at the trial.

*Frisbee vs. Fitzsimmons*, 3 *Iun.*, 674.

The party should ask leave to withdraw a juror.

*Dillon vs. Cockcroft*, 90 *N. Y.*, 649.

*Tampering.*—It is competent to prove that the adverse party has tampered with witnesses<sup>1</sup> or a juror.<sup>2</sup>

<sup>1</sup>*Gallerett vs. McKinley*, 27 *Iun.*, 320 (offer to bribe).

*Chicago City R. R. Co. vs. McMahon*, 103 *Ill.*, 485.

*Egan vs. Bowker*, 5 *Allen*, 449 (subornation of a deposition, competent though deposition be not used).

*Brown vs. Byam* (*Iowa*, 1884), 21 *Northw. Rep.*, 684.

*Snell vs. Bray*, 56 *Wisc.*, 156; s. c., 14 *Northw. Rep.*,

14 (letters urging testimony in specified way, or warning against aiding adversary).

*People vs. Marion*, 29 *Mich.*, 31.

Unnecessary to cross-examine the witness first.

*Martin vs. Barnes*, 7 *Wisc.*, 239.

<sup>2</sup>*People vs. Marion*, 29 *Mich.*, 31.

That plaintiff's agent tampered with evidence, not enough, unless shown to have been done in the course of employment.

*Green vs. Town of Woodbury*, 48 *Vt.*, 5.

*Chicago City R. R. Co. vs. McMahon*, 103 *Ill.*, 485.

A party charged with tampering has a right to testify in explanation.

*Horner vs. Everett*, 91 *N. Y.*, 641.

*Donohue vs. People*, 56 *id.*, 208.

*Lynch vs. Coffin*, 131 *Mass.*, 311 (saying the judge may in his discretion allow explanation).

*Telegrams.*—In general, where the course of communication is such that the message *as delivered to the telegraph company* binds either party, that paper is primary evidence as against such party. Where such, that the message *as received* binds either party, that paper is primary evidence, as against him.

*Oregon Steamship Co. vs. Otis*, 14 *Abb. N. C.*, 388, 394, with note, and cases there collected on all the various aspects of offering telegrams as evidence.

Relevant letters and telegrams which the party on testifying as a witness does not deny that he received or sent, may be received if they are a connected part of a correspondence otherwise already in evidence.

*Ib.*

*Telephone.*—One who knowingly communicates by telephone, through the operator at the other end interpreting what he says to his interlocutor, makes the operator his agent; and the statements so made by the operator are competent against the sender, and may be proved by any person who heard the operator's interpretations.

*Sullivan vs. Kuykendall*, 13 *Wash. L. Rep.*, 164; s. c., 24 *Am. L. Reg., N. S.*, 442; disapproved in note in *id.*, 452.

Compare *Shear vs. Van Dyke*, 10 *Hun*, 528, under "*Memory*" (p. 98, *above*).

Whether the utterance of voice as heard through the telephone is alone sufficient evidence of identity;

See 28 *Alb. L. J.*, 422.

*Trust.*—Oral evidence is competent to establish a trust, notwithstanding the Statute of Frauds, where its exclusion would work a fraud.

*Marie vs. Garrison*, 13 *Abb. N. C.*, 334, 338, *note*.

*Wood vs. Rabe*, 96 *N. Y.*, 414.

As to tracing proceeds,—see

*Knatchbull vs. Hallett*, *L. R.*, 13 *Ch. Div.*, 696.

*Hooley vs. Gieve*, 9 *Abb. N. C.*, 41, *note*.

*United States Courts.*—"The mode of proof, in the trial of actions at common law, shall be by oral testimony and examination of witnesses in open Court, except as hereinafter provided."

*U. S. R. S.*, § 861.

The provisions referred to as "hereinafter" relate to taking depositions, and do not sanction examinations before trial, such as allowed by recent State statutes.

*Exp. Fisk*, 113 *U. S.*, 713, 726.

Every action at law in a court of the United States must be governed by the rule, or by the exceptions, which *U. S. R. S.*, § 861 (*above*), provides. There is no place for exceptions made by State statutes.

*Ib.*

"In the Courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: *Provided*, That in actions by or against executors, administrators, or guard-



ians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the Court."

*U. S. R. S.*, § 858.

This provision (*U. S. R. S.*, § 858), wherever it differs from the State statutes, controls the United States Courts.

*King vs. Worthington*, 104 *U. S.* (14 *Otto*), 44, 51.

In other respects than as above provided the law of evidence prevailing in the State Courts controls the Courts of the United States.

*U. S. R. S.*, § 858, last clause.

*Vance vs. Campbell*, 1 *Black*, 427; s. c., with note, 66 *U. S.* (*Law. ed.*), 168.

*King vs. Worthington*, 104 *U. S.* (14 *Otto*), 44, 50.

*Conn. Life Ins. Co. vs. Union Trust Co.*, 112 *U. S.*, 250, 255.

*Usage.*—In the interpretation of a contract, a uniform, continuous, and well-settled usage pertaining to its subject may be proved, if not opposed to the law and not unreasonable.

*Walls vs. Bailey*, 49 *N. Y.*, 464; s. c., 10 *Am. R.*, 407.

*Barnard vs. Kellogg*, 10 *Wall.*, 383.

*Fuller vs. Robinson*, 86 *N. Y.*, 306; s. c., 40 *Am. R.*, 540.

For the general rule and its exceptions, see

1 *Abb. N. C.*, 470, note, and *Abb. Tr. Ev.*, 296.

Usage cannot be proved to contradict a rule of law; <sup>1</sup> or contradict unambiguous terms in the contract; <sup>2</sup> or its legal effect. <sup>3</sup>

<sup>1</sup>*Corn Exchange Bank vs. Nassau Bank*, 91 *N. Y.*, 74, and *cas. cit.*

*Barnard vs. Kellogg*, 10 *Wall.*, 383.

<sup>2</sup>*Farmers' & Mech. Nat. Bk. of Buffalo vs. Logan*, 74 *N. Y.*, 568.

<sup>3</sup>*Barnard vs. Kellogg*, 10 *Wall.*, 383.

Usage of language may be proved to show the meaning of words otherwise unambiguous.

*Myers vs. Sarl*, 30 *L. J. Q. B.*, 9; s. c., 7 *Jur.*, *N. S.*, 97.

If a usage of a particular trade or locality is proved, the adverse party, if not of such trade, may rebut its effect by proving his ignorance of it.

*Walls vs. Bailey*, 49 *N. Y.*, 464; s. c., 10 *Am. R.*, 407.

*Johnson vs. De Peyster*, 50 *N. Y.*, 666.

The good faith of a transaction being impugned, conformity to usage may be shown.

*Dutchess Co. Mut. Ins. Co. vs. Hachfield*, 73 *N. Y.*, 226.

*Value and damage.*—Where the witness is competent and states the facts, his conclusion as to the amount of pecuniary injury to property having a market value—i. e., the value before and after the injury—is generally deemed admissible, although it may be identical with the question on which the jury are to find.

*Abb. Tr. Ev.*, 598.

3 *Abb. N. Y. Dig.*, 79.

7 *id.*, 755–757.

*Witness' memory.*—A party may aid the memory of his own witness by inquiring as to any circumstance tending to enable him to recollect more clearly or more certainly the fact sought to be proved.

*O'Hagan vs. Dillon*, 76 *N. Y.*, 170.

See also *Reason* and *Relevancy* (above).

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## XIV.—STOPPING THE CASE.

- |   |                         |
|---|-------------------------|
| 1. Voluntary nonsuit — common law rule. | 7. — exceptional cases. |
| 2-6. — statutory restrictions.          | 8. Withdrawal of juror. |
- 

1. *Voluntary nonsuit — common law rule.*—At common law plaintiff has a right voluntarily to submit to nonsuit at any time before the jury have rendered their verdict.

*Wooster vs. Burr*, 2 *Wend.*, 295.

*Grah. Pr.*, 2 ed., 310.

*Smith's Action*, 137.

s. p., *Bell vs. Gardner*, 77 *Ill.*, 319.

*Dove vs. Hanks*, 3 *McCord (So. Car.)*, 559.

Even after charge, and verdict made up, but not announced.

*Graham vs. Tate*, 77 *N. C.*, 120.

*Tate vs. Phillips*, *id.*, 126.

*Root vs. Peeples*, 48 *Geo.*, 592.

Not allowed after verdict published or delivered to one allowed by the Court to receive it.

*Merchants Bank vs. Rawls*, 7 *Geo.*, 191; s. c., 50 *Am. Dec.*, 394.

Allowed even after motion for compulsory nonsuit made a sufficient ground.

*Pescud vs. Hawkins*, 71 *N. C.*, 299.

s. r., *Schafer vs. Weaver*, 20 *Kans.*, 294.

Whether the jury leave their bench or not, plaintiff, by not answering when called, may preclude them from giving a verdict.

*Cunningham vs. Duncan*, *Anth. N. P.*, 61.

His silence is not assent to the reading of a verdict.

*People vs. Mayor of Albany*, 1 *Wend.*, 36.

2. — *statutory restrictions*.—In *New York*,<sup>1</sup> *Missouri*,<sup>2</sup> *Kansas*,<sup>3</sup> *Iowa*<sup>4</sup> and *Texas*,<sup>5</sup> this cannot be done after the cause has been submitted to the jury to consider of their verdict.

<sup>1</sup> *N. Y. Code Civ. Pro.*, § 1182.

<sup>2</sup> *Fink vs. Bruhl*, 47 *Mo.*, 173.

*Savoni vs. Brashear*, 46 *id.*, 345.

<sup>3</sup> *Schafer vs. Weaver*, 20 *Kans.*, 294.

<sup>4</sup> *Harris vs. Beam*, 46 *Iowa*, 118 (holding that it may be done after the judge has directed a verdict, for the jury have not been then directed to retire nor to enter upon the consideration of the case without retiring).

<sup>5</sup> *Frois vs. Mayfield*, 31 *Tex.*, 366.

*Peck vs. McKellar*, 33 *id.*, 234.

3. — *the same*.—In *Massachusetts* and *New Hampshire* submitting to a voluntary nonsuit after the trial has begun, rests in the discretion of the Court; allowing it as matter of right, without the exercise of discretion, is error.

*Truro vs. Atkins*, 122 *Mass.*, 418.

*Fulford vs. Converse*, 54 *N. H.*, 543, and *cas. cit.*

Before the cause is opened to the jury it is matter of right.

*Burbank vs. Woodward*, 124 *Mass.*, 357.

*Farr vs. Cate*, 58 *N. H.*, 367.

4. — *the same*.—In *Pennsylvania* the statute terminates plaintiff's right to submit to a nonsuit at the point

When the jury, in response to the usual inquiry, have fully announced to the Court their readiness.

*McLughan vs. Board*, 4 *Watts (Pa.)*, 308, 316.

*Easton Bk. vs. Coryell*, 9 *Watts & S.*, 153.

*Kates vs. Lewis*, 2 *Penn. L. J. R.*, 268 (foot p. 53).

5. — *the same.*—In *Indiana*,<sup>1</sup> *Virginia*<sup>2</sup> and *Alabama*,<sup>3</sup> it cannot be done after the jury have retired.

<sup>1</sup> *Dunning vs. Galloway*, 47 *Ind.*, 182.

*Helm vs. First Nat'l Bk.*, 91 *id.*, 44.

2 *Ind. R. S.*, 1876, p. 184; *Code*, § 363.

<sup>2</sup> 4 *Minor's Inst.*, part 1, p. 782, etc.

<sup>3</sup> *Blackburn vs. Minter*, 22 *Ala.*, 613.

6. — *the same.*—In *California* it may be done at or before the close of the evidence on both sides.

*Hancock Ditch Co. vs. Bradford*, 13 *Cal.*, 637.

7. — *exceptional cases.*—But plaintiff cannot submit to a nonsuit against objection, where a claim by defendant for affirmative relief is well pleaded,<sup>1</sup> nor where plaintiff has already made a case which by statute entitles defendant to judgment.<sup>2</sup>

<sup>1</sup> *Merchant's Bank vs. Schulenberg*, 48 *Mich.*, 102; s. c., 19 *Northw. Rep.*, 741; abst. s. c., 30 *Alb. L. J.*, 22, and cases cited.

Otherwise of a mere set-off, not involving any cross-claim to relief.

*Wooster vs. Burr*, 2 *Wend.*, 295.

s. p., *Riley vs. Carter*, 3 *Humph. (Tenn.)*, 230.

<sup>2</sup> As in the case of an officer sued in the wrong county, and thereupon, under the statute, entitled to a verdict in his favor.

*Hull vs. Southworth*, 5 *Wend.*, 265.

8. *Withdrawal of juror.*—A judge has power, in his discretion, in case of surprise or other cause which would

render the progress of the trial unjust or unfair to either party, to withdraw a juror and postpone the trial.

*Dillon vs. Cockroft*, 90 *N. Y.*, 649 (*arguendo*).

*Glendening vs. Canary*, 5 *Daly*, 489; *aff'd* in 64 *M. Y.*, 636, without opinion.

*Messenger vs. Fourth Nat'l Bk.*, 6 *Daly*, 190; s. c. 48 *How. Pr.*, 542, and *cas. cit.* (surprise).

*People vs. Judges of N. Y. Com. Pl.*, 8 *Cow.*, 127 (defect in testimony).

s. p., *St. John vs. Duncan*, 2 *Monthl. L. Bul.*, 20 (defect in complaint).

The English practice requires consent of parties.

Such a withdrawal is no ground for a judgment of nonsuit. *Planer vs. Smith*, 40 *Wisc.*, 31.

Where the parties agree to withdraw a juror, each party pays his own costs.

2 *Tidd's Pr.*, 2 *Am.* (from 8 *Lond.*) ed. 909.

## XV.—TAKING THE CASE FROM THE JURY.

[In some jurisdictions the mode of taking the case from the jury is—if at the instance of the plaintiff,—by motion to direct a verdict; if at the instance of defendant, either by motion for a nonsuit, or by motion to direct a verdict, according to whether defendant is merely to put plaintiff out of Court, or to have a final adjudication against him. In these jurisdictions a motion for nonsuit is also called a motion to dismiss the complaint, the latter designation being more usual where the dismissal is on the pleadings; the former where it is on the proofs.

In some other jurisdictions the mode of taking the case from the jury is only by directing a verdict at the instance of either party.

In still others it is by demurrer to evidence.

The differences between these methods are to a great extent differences only in name and form of procedure; but there are consequent differences in the effect of the adjudication, which need not be noticed here.

The underlying principle of each of these methods is to dispose of the case by the decision of the judge if no proper question for a jury has been presented; and the rules which regulate the motion in either form and determine how it should be

decided, are in the main the same, and are here presented together as substantially applicable to all these modes of presenting the question; but with this noteworthy exception that, according to the weight of authority, a motion for nonsuit or to direct a verdict, after the evidence of both parties has been heard and closed, is determined on the whole case, a demurrer to evidence is determined only on the evidence of the demurree].

#### A. THE RIGHT TO TAKE THE CASE FROM THE JURY.

1. Power of the Court.
2. Right of the party.
3. Test of the right to go to jury.

#### B. MODE OF APPLYING TO TAKE THE CASE FROM THE JURY.

4. Defendant's motion,—when.
5. — after strict cross-examination.
6. — after full cross-examination.
7. — after final close of case.
8. — several co-defendants.
9. — several co-plaintiffs.
10. — several causes of action.
11. — plaintiff's course to defeat motion.
12. Plaintiff's motion for a verdict.

#### C. RULES OF DECISION.

13. Contents of pleading to be considered together.
14. General rule as to assuming truth of adversary's evidence.

#### 15. Sufficiency of evidence.

#### 16. Different inferences.

#### 17. Interested testimony.

#### 18. Party's admission by refusal to testify.

#### 19. Direct met by circumstantial evidence.

#### 20. Affirmative testimony met only by negative.

#### 21. Positive met only by a conclusion of law.

#### 22. Uncontradicted evidence of specific fact.

#### 22a. Expert testimony.

#### 23. Nominal damages.

#### 24. Mode of taking case from jury.

#### D. VERDICT SUBJECT TO THE OPINION OF THE COURT.

#### 25. When may be directed.

#### 26. Contest as to facts.

#### 27. Questions of evidence.

#### 28. Determining amount.

#### 29. Effect of consent.

### A. THE RIGHT TO TAKE THE CASE FROM THE JURY.

1. *Power of the Court.*—Upon an undisputed state of facts the Court may render the judgment or direct the verdict which the law requires without the aid or advice of the jury.

*Appleby vs. Astor Fire Ins. Co.*, 54 *N. Y.*, 253, 260.

*Oscanyan vs. Arms Co.*, 103 *U. S.* (13 *Otto*), 261, 266.

*Hendrick vs. Lindsay*, 93 *id.* (3 *Otto*), 143.

*Bemis vs. Woodworth*, 49 *Iowa*, 340.

*Lane vs. Old Colony R. R. Co.*, 14 *Gray*, 143.

*McLaren vs. Indianapolis & Vincennes R. R. Co.*, 83 *Ind.*, 319 (where it was held no error to recall the jury and direct a verdict for defendant).

*Thomasson vs. Groce*, 42 *Ala.*, 431.

*Cutler vs. Hurlburt*, 29 *Wisc.*, 152, 165.

*Chenery vs. Palmer*, 6 *Cal.*, 119, 122.

See also cases under paragraph 2 (*below*).

“In every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.”

*Pleasants vs. Fant*, 22 *Wall.*, 116, 120, and *cas. cit.*

This rule requires not merely undisputed testimony, but an undisputed state of facts; for if differences of fact may be drawn from undisputed testimony the case raises a question that the jury ought to pass upon.

See paragraph 16 (*below*).

And in those jurisdictions, where the “scintilla of evidence” doctrine prevails, the Court cannot take the case from the jury where there is any evidence tending to prove the issue.

*Robinson vs. Louisville R. R. Co.*, 2 *Lea (Tenn.)*, 594.

*Smith vs. Gillett*, 50 *Ill.*, 290.

“Undisputed” here does not, however, mean that the counsel shall have ceased to contest; but that in contemplation of law there should not be room for dispute.

For the various methods in which the rule in the text is applied in different jurisdictions see note to next section.

2. *Right of the party*.—In a case where it is proper to take the cause from the jury, the right of the party, and the power of the judge, are correlative; the right implies the duty.

*Lomer vs. Meeker*, 25 *N. Y.*, 361.

*Pleasants vs. Fant*, 22 *Wall.*, 116, 120, and *cas. cit.*

The reason is that the judge, if he understands the law applicable to the case, ought to protect parties against unjust verdicts, and ought not to occupy the jury, the parties and the public time in reaching a verdict (or possibly a disagreement) in a case, where, if a verdict adverse to his opinion were reached, it would forthwith be his duty to set it aside on motion for new trial.

## XV.—TAKING THE CASE FROM THE JURY—*Continued.* 111

The following analysis of the authorities shows in what jurisdictions this rule is now established; and in what it has been denied or qualified.

It should be added, that the practice in several jurisdictions which have not yet acceded to this rule appears to be in a transition state.

### *United States Courts—*

Schuhardt *vs.* Allens, 1 *Wall.*, 359 (compulsory nonsuit after evidence taken is not allowed in the Federal Courts).

Insurance Company *vs.* Folsom, 18 *Wall.*, 237 (direction of a verdict is a matter of right in a proper case).

Pleasants *vs.* Fant, 22 *Wall.*, 116.

Merchants Nat. Bank *vs.* State Nat. Bank, 3 *Cliff.*, 205.

Retzer *vs.* Wood, 109 *U. S.*, 185 (error to refuse to direct a verdict for plaintiff in a proper case).

### *Alabama—*

Smith *vs.* Seaton, *Minor*, 75 (in absence of statute Court has no power to grant compulsory nonsuit, but may direct the jury how to find; and if they disobey may grant new trial).

Saunders *vs.* Coffin, 16 *Ala.*, 421.

### *Arkansas—*

Martin *vs.* Webb, 5 *Ark.*, 72; s. c., 39 *Am. Dec.*, 363 (Court has no power to grant compulsory nonsuit, but may direct jury to find as in case of nonsuit).

Hill *vs.* McLean, 14 *Ark.*, 706 (such a verdict bars a future action).

Obaugh *vs.* Finn, 4 *Ark.*, 110; s. c., 37 *Am. Dec.*, 773 (demurrer to evidence; dictum that in proper case it is a matter of legal right).

### *California—*

Dalrymple *vs.* Hanson, 1 *Cal.*, 125 (nonsuit; error to refuse).

Johnson *vs.* Moss, 45 *Cal.*, 515.

Selden *vs.* Cushman, 20 *Cal.*, 56 (direction of a verdict granted in a proper case).

### *Connecticut—*

Naugatuck R. R. Co. *vs.* Waterbury Button Co., 24 *Conn.*, 468 (nonsuit authorized by a statute which is held not to be unconstitutional as violating the right of trial by jury).



*Colorado—*

*Behrens vs. Kansas Pac. R. R. Co.*, 5 *Col.*, 400 (nonsuit seems matter of right).

*Murphy vs. Cobb, id.*, 281 (direction of a verdict, a duty in a proper case).

*Dakota—*

*Holt vs. Van Eps*, 1 *Dak.*, 206 (compulsory nonsuit not allowed).

*Territory vs. Stone*, 2 *Dak.*, 155 (direction of verdict proper when evidence is not sufficient to sustain a contrary verdict).

*Delaware—*

*Flanagan vs. City of Wilmington*, 4 *Houst. (Del.)*, 546 (compulsory nonsuit allowed).

*Federal Courts—*(See head of the list above).

*Florida—*

*Ferguson vs. Porter*, 3 *Fla.*, 27 (direction of a verdict not allowable, it seems, as it contravenes a Florida statute).

*Hinote vs. Simpson*, 17 *Fla.* 444 (demurrer to evidence seems allowable in proper cases).

*Georgia—*

*Tison vs. Yawn*, 15 *Geo.*, 491 (nonsuit).

*Hanson vs. Crawley*, 51 *Geo.*, 528, 533 (direction of verdict for defendant at close of plaintiff's case, is not proper; but a motion for a nonsuit at that stage of the trial is the proper way to raise the question of sufficiency of plaintiff's evidence).

*Illinois—*

*Holmes vs. Chicago & Alton R. R. Co.*, 94 *Ill.*, 439, 444 (nonsuit seems allowable only at close of plaintiff's case upon an entire failure of evidence as to an essential point. Motion to exclude all of the plaintiff's evidence is an equivalent remedy).

Compare *Poleman vs. Johnson*, 84 *Ill.*, 269 (where the power of the Court to nonsuit under the Illinois statute is questioned, but holding it error to deny motion to exclude all of the plaintiff's evidence upon an entire failure of proof on an essential point. Direction of verdict for defendant is a matter of right in such a case).

*Pennsylvania Co. vs. Conlan*, 101 *Ill.*, 93 (motion to exclude plaintiff's evidence is in the nature of a demurrer to evidence and is tested by the same rules).

*Indiana*—

- Williams vs. Port*, 9 *Ind.*, 551 (compulsory nonsuit not allowed).  
*Bool vs. Davis*, 5 *Blackf. (Ind.)*, 115; s. c., 33 *Am. Dec.*, 457.  
*Purcell vs. English*, 86 *Ind.*, 34.  
*Crookshank vs. Kellogg*, 8 *Blackf. (Ind.)*, 256 (direction of verdict. Error to refuse).  
*Strough vs. Gear*, 48 *Ind.*, 100 (demurrer to evidence allowable under Indiana Code of Procedure).

*Iowa*—

- Way vs. Ill. Centr. R. R. Co.*, 35 *Iowa*, 585 (compulsory nonsuit not allowed by *Iowa R. S.*, §§ 3127, 3128).  
*Bemis vs. Woodworth*, 49 *Iowa*, 340 (direction of a verdict proper on undisputed evidence).

*Kansas*—

- Case vs. Hannahs*, 2 *Kans.*, 490 (compulsory nonsuit not authorized by the *Kans. Code*. In case of total failure of proof on an essential point the Court should so instruct the jury).  
*Union Pacific R. R. Co. vs. Adams* (*Kansas*, 1885), 6 *Pac. Rep.*, 529, and cas. cit. (error not to sustain demurrer to evidence).

*Kentucky*—

- Parker vs. Jenkins*, 3 *Bush (Ky.)*, 588 (error to refuse to direct verdict where defense was established by uncontradicted evidence).  
*Hanks vs. Roberts*, 3 *J. J. Marsh. (Ky.)*, 298 (error to refuse to direct where evidence would not sustain a contrary verdict).  
 See *Buford vs. Louisville, etc., R. R. Co.*, 5 *Ky. L. Rep. & J.*, 503, opposing *Thompson vs. Thompson*, 17 *B. Monr.*, 28.

*Louisiana*—

- Wilson vs. McHugh*, 1 *La.*, 380 (nonsuit proper if evidence is insufficient).

*Maine*—

- White vs. Bradley*, 66 *Me.*, 254 (nonsuit on uncontradicted evidence raising only question of law, held proper).  
*Heath vs. Jaquith*, 68 *Me.*, 433, 436 (direction of a verdict proper when evidence will not authorize a verdict for opposite party).  
*State vs. Soper*, 16 *Me.*, 293 (demurrer to evidence. Unusual and no error to refuse to receive it).

*Maryland—*

- Rettlewell *vs.* Peters, 23 *Md.*, 312 (nonsuit not adopted and contrary to practice).  
 Baltimore & Ohio R. R. Co. *vs.* Stricken, 51 *Md.*, 47 (error to refuse to direct verdict when there is no evidence to sustain contrary verdict).

*Massachusetts—*

- Mitchell *vs.* New England, etc., Ins. Co., 6 *Pick.*, 117, 118.  
 Marshall *vs.* Merritt, 97 *Mass.*, 516 (it seems that a nonsuit cannot be ordered against the plaintiff's consent. Compare, however, *Wentworth vs. Leonard*, 4 *Cush.*, 414, 418, SHAW, Ch. J).  
 Lane *vs.* R. R. Co., 14 *Gray (Mass.)*, 143.  
 Denny *vs.* Williams, 5 *Allen*, 1.  
 Allyn *vs.* Boston & Albany R. R. Co., 105 *Mass.*, 77.  
 Tully *vs.* Fitchburg R. R. Co., 134 *Mass.*, 499 (direction of a verdict. Error to refuse in a proper case).  
 Copeland *vs.* New England Ins. Co., 22 *Pick. (Mass.)*, 135, 143 (demurrer to evidence seems matter of right, but that it is rarely resorted to in Massachusetts practice, see *Golden vs. Knowles*, 120 *Mass.*, 336).

*Michigan—*

- Cahill *vs.* Kalamazoo Mut. Ins. Co., 2 *Doug. (Mich.)*, 124 (Court cannot compel nonsuit).  
 Grand Trunk R. Co. *vs.* Nichol, 18 *Mich.*, 170 (direction of a verdict; error to refuse where there is no conflicting evidence).

*Minnesota—*

- McCormick *vs.* Miller, 19 *Minn.*, 443 (compulsory nonsuit allowed by statute).

*Mississippi—*

- Winston *vs.* Miller, 12 *S. & M.*, 550, 554 (no power of compulsory nonsuit, but there is an equivalent remedy in directing a verdict against the plaintiff).  
 Ewing *vs.* Glidwell, 3 *How. (Miss.)*, 332, 335 (no power to nonsuit, but Court may instruct jury to find a verdict as in case of nonsuit, and this is often done).  
 Chicago, etc., R. R. Co. *vs.* Doyle, 60 *Miss.*, 977 (direction of verdict seems matter of right in a proper case).

*Missouri—*

- St. Louis Floating Dock Ins. Co. *vs.* Soulard, 8 *Mo.*, 665 (compulsory nonsuit not allowed).  
 Wells *vs.* Gaty, *id.*, 681.  
 Morgan *vs.* Durfee, 69 *Mo.*, 469; s. c., 9 *Cent. L. J.*, 12 (direction of verdict. Error to refuse in a proper case. Rule well stated).

**Nebraska—**

- Smith *vs.* Sioux City, etc., R. R. Co., 15 *Nebr.*, 583;  
s. c., 19 *Northw. Rep.*, 638 (compulsory nonsuit not  
authorized by *Nebr. Civ. Code*, § 430. Error to  
grant it).  
Atchison & Nebr. R. R. Co. *vs.* Losee, 4 *Nebr.*, 446  
(direction of a verdict. Error to refuse).

**Nevada—**

- Laws of Nevada*, 1873, § 1212 (nonsuit allowed by  
statute when the plaintiff fails to prove a sufficient  
case for the jury).

**New Hampshire—**

- Stickney *vs.* Stickney, 1 *Fost.*, 61 (nonsuit; error to  
refuse).  
Bailey *vs.* Kimball, 6 *id.*, 351, 354.  
Brown *vs.* Insurance Co., 58 *N. H.*, 298 (nonsuit;  
error to refuse).  
Dame *vs.* Dame, 20 *N. H.*, 28 (direction of a verdict  
proper for insufficient evidence).

**New Jersey—**

- New Jersey Express Co. *vs.* Nichols, 4 *Vroom*, 434,  
438 (nonsuit; error to refuse).  
Baldwin *vs.* Shannon, 43 *N. J. L.*, 596 (direction of a  
verdict proper where a verdict for opposite party  
would be set aside).

**New Mexico—**

- Herrera *vs.* Chaves, 2 *New Mex.*, 86.  
Montoyra *vs.* Donohue, *id.*, 214 (compulsory nonsuit  
cannot be granted).

**New York—**

- Lomer *vs.* Meeker, 25 *N. Y.*, 361 (motion for nonsuit  
or to dismiss complaint, or to direct verdict; error  
to refuse).  
Robinson *vs.* McManus, 4 *Lans.*, 380, 386.  
Fish *vs.* Davis, 62 *Barb.*, 122.  
Appleby *vs.* Astor Fire Ins. Co., 54 *N. Y.*, 253, 261  
(motion to direct verdict equivalent to motion for  
nonsuit [but note that it is more serious in results]).

**North Carolina—**

- Andrews *vs.* Pritchett, 66 *N. C.*, 387 (compulsory  
nonsuit cannot be granted).  
Carleton *vs.* Byers, 71 *N. C.*, 331 (compulsory non-  
suit improper, but Court may direct verdict for  
defendant).  
Wittowski *vs.* Wasson, 71 *N. C.*, 451 (scintilla of evi-  
dence not enough to go to the jury).

*Ohio—*

*Ellis vs. Ohio Life Ins., etc., Co.*, 4 *Ohio St.*, 62 (compulsory nonsuit allowed only on an entire failure of evidence as to some essential point. Substituted for the ancient practice of demurrer to evidence).

*Powell vs. Jones*, 12 *Ohio*, 35.

*Oregon—*

*Tippin vs. Ward*, 5 *Oreg.*, 450 (compulsory nonsuit).

*Cogswell vs. Oregon & Cal. R. R. Co.*, 6 *Oreg.*, 417.

*Pennsylvania—*

*Lehman vs. Kellman*, 65 *Penn. St.*, 489 (compulsory nonsuit, but error will not lie to a refusal; for defendant may ask for direction that plaintiff's evidence is insufficient to maintain his action).

See also *Borough of Easton vs. Neff*, 102 *Penn. St.*, 474; s. c., 17 *Reporter*, 59.

*Hyatt vs. Johnston*, 91 *Penn. St.*, 196 (direction of verdict; error to refuse plaintiff in this case).

*Rhode Island—*

*Hopkins vs. Brown*, 5 *R. I.*, 357, 360 (compulsory nonsuit seems to be allowed only where there is total lack of evidence on an essential point).

*Cassidy vs. Angell*, 12 *R. I.*, 447, 448.

*South Carolina—*

*Carrier vs. Dorrance*, 19 *S. C.*, 30 (compulsory nonsuit only allowed on entire failure of evidence as to some essential point. Then error to refuse).

*Graham vs. Moore*, 13 *S. C.*, 115 (direction of a verdict, a duty in a proper case).

*Tennessee—*

*Scruggs vs. Brackin*, 4 *Yerg.*, 528.

*Hunter vs. Sevier*, 7 *id.*, 127, 134 (Courts have no power to nonsuit, nor to entertain demurrer to evidence).

*Littlejohn vs. Fowler*, 5 *Cold.*, 284 (nonsuit said to be unconstitutional).

*Texas—*

*Guest vs. Guest, Dallam (Texas)*, 394.

*McGill vs. Delaplain, id.*, 493 (Court cannot compel a nonsuit).

*Willis vs. Bullitt*, 22 *Texas*, 330 (direction of a verdict in a proper case).

*United States Courts—*

(See head of the list above.)

*Vermont*—

Smith *vs.* Crane, 12 *Vt.*, 487 (Court cannot order nonsuit; error to do so).

Wright *vs.* Bourdon, 50 *Vt.*, 494 (direction of a verdict in a proper case).

*Virginia*—

*Minor's Institutes*, Vol. IV., p. 782 (Courts cannot compel nonsuit. Citing *Ross vs. Gill*, 1 *Wash. (Va.)*, 87, 89; *Thweat vs. Finch*, *id.*, 217, 219).

Trout *vs.* Va. & Tenn. R. R. Co., 23 *Gratt. (Va.)*, 619 (demurrer to evidence seems a matter of right).

Eubank *vs.* Smith, 2 *Hans. (Va.)*, 206 (demurrer to evidence; Court has power to compel joinder in a proper case).

*West Virginia*—

Dresser *vs.* Transportation Co., 8 *W. Va.*, 553 (motion to exclude all of plaintiff's evidence at close of his case is governed by same rules as demurrer to evidence, and is allowed in a proper case).

Allen *vs.* Bartlett, 20 *W. Va.*, 46 (demurrer to evidence).

*Wisconsin*—

Hunter *vs.* Werner, 1 *Wisc.*, 141.

Hoeflinger *vs.* Stafford, 38 *id.*, 391 (compulsory nonsuit; error to refuse).

Jackson *vs.* Jacksonport, 56 *Wisc.*, 310 (direction of a verdict proper when evidence, considered as undisputed, and aided by most favorable legitimate construction and all reasonable inferences, would not justify a contrary verdict).

*Wyoming*—

Mulhern *vs.* Union Pac. R. R. Co., 2 *Wy.*, 465 (compulsory nonsuit cannot be ordered).

3. *Test of the right to go to jury.*—The general test as to the propriety of refusing to submit a point to the jury is whether their verdict on the point if against the moving party, must be set aside as contrary to or against the weight of evidence.

Cagger *vs.* Lansing, 64 *N. Y.*, 417, 427; *aff'g* 4 *Hun*, 812.

Corning *vs.* Troy Iron & Nail Factory, 44 *N. Y.*, 577, 594.

Neuendorff *vs.* World Mut. Life Ins. Co., 69 *N. Y.*, 389.

- Burt *vs.* Smith, 11 *Weekly Dig.*, 278; mem. s. c., 83 *N. Y.*, 606 (no opinion).  
 Fish *vs.* Davis, 62 *Barb.*, 122.  
 Wombough *vs.* Cooper, 2 *Hun*, 428; s. c., 4 *Supm. Ct. (T. & C.)*, 586, and a case of negligence forms no exception to the rule.  
 Wilds *vs.* Hudson River R. R. Co., 24 *N. Y.*, 430.  
 Pleasants *vs.* Fant, 22 *Wall.*, 116, 121.  
 Hendrick *vs.* Lindsay, 93 *U. S. (3 Otto)*, 143.  
 Herbert *vs.* Butler, 97 *U. S. (7 Otto)*, 319.  
 Bowditch *vs.* Boston, 101 *U. S. (11 Otto)*, 16.  
 Griggs *vs.* Houston, 104 *U. S. (14 Otto)*, 553.  
 Phoenix Mut. Ins. Co. *vs.* Doster, 106 *U. S. (16 Otto)*, 30.  
 Montclair *vs.* Dana, 107 *U. S. (17 Otto)*, 162.  
 Randall *vs.* Balt. & Ohio R. R. Co., 109 *U. S.*, 478.  
 Adams *vs.* Spangler (*Circ. Ct., D. Col.*), 17 *Fed. Rep.*, 133.  
 Connecticut Mut. Life Ins. Co. *vs.* Lathrop, 111 *U. S.*, 612; s. c., 17 *Reporter*, 677.  
 Bagley *vs.* Cleveland Rolling Mill Co. (*U. S. Circ. Ct., N. D. N. Y.*), 21 *Fed. Rep.*, 159 (where it is held to be the duty of the Court to direct a verdict for the plaintiff if a verdict for the defendant would be set aside as contrary to evidence).  
*Proffatt on Jury Trial*, § 354, and cases cited.  
 Burnam *vs.* De Vaughn, 65 *Geo.*, 309.  
 Zettler *vs.* The City of Atlanta, 66 *Geo.*, 195.  
 Ayerigg *vs.* New York & Erie R. R. Co., 1 *Vroom (N. J.)*, 468.  
 Baldwin *vs.* Shannon, 43 *N. J. L.*, 596.  
 Hunter *vs.* Warner, 1 *Wisc.*, 141.  
 Spensley *vs.* The Lancashire Ins. Co., 54 *Wisc.*, 433.  
 Jackson *vs.* Jacksonport, 56 *Wisc.*, 310.  
 Dalrymple *vs.* Hanson, 1 *Cal.*, 125.  
 Ensminger *vs.* McIntyre, 23 *Cal.*, 593, 594.  
 Weis *vs.* The City of Madison, 75 *Ind.*, 241.  
 Hyatt *vs.* Johnson, 91 *Penn. St.*, 196.  
 Brown *vs.* European & N. American R. R. Co., 58 *Me.*, 384.  
 Heath *vs.* Jaquith, 68 *Me.*, 433, 436. (Compare, however, *State Co. vs. Tilton*, 69 *Me.*, 244.)  
 Brown *vs.* Mass. Mut. Life Ins. Co., 59 *N. H.*, 298; s. c., 13 *Ins. L. J.*, 208, 211 (where it is also said that in applying the test it does not seem to be material whether the motion [for a nonsuit] is made at the close of the plaintiff's case, or whether it is delayed till all the evidence is in).

Chicago, etc., R. R. Co. *vs.* Doyle, 60 *Miss.*, 977.

Morgan *vs.* Durfee, 69 *Mo.*, 469; s. c., 9 *Cent. Law J.*, 12.

Atchison & Nebraska R. R. Co. *vs.* Losee, 4 *Nebr.*, 446.

Reynolds *vs.* Burlington & Miss. R. R. Co., 11 *Nebr.*, 186.

Buford *vs.* Louisville & Nashville R. R. Co. (*Jefferson Ct. Com. Pl. [Ky.]*), 5 *Ky. L. Rep. & J.*, 503 (*contra*, Thompson *vs.* Thompson, 17 *B. Mon. [Ky.]*, 28).

Territory *vs.* Stone, 2 *Dak.*, 155.

The test would seem to be the same in Connecticut.

Compare Booth *vs.* Hart, 43 *Conn.*, 480, 484, with Osborne *vs.* Bradley, 46 *Conn.*, 465, 466.

In Massachusetts the rule as laid down in Denny *vs.* Williams, 5 *Allen*, 1, and apparently approved in Brooks *vs.* Somerville, 106 *Mass.*, 271, 275, is that "if the evidence is such that the Court would set aside any number of verdicts rendered upon it, *toties quoties*, then the cause should be taken from the jury, by instructing them to find a verdict for the defendant. On the other hand, if the evidence is such that though one or two verdicts rendered upon it would be set aside upon motion, yet a second or third verdict would be suffered to stand, the cause should not be taken from the jury, but should be submitted to them under proper instructions."

## B. MODE OF APPLYING TO TAKE CASE FROM JURY.

4. *Defendant's motion,—when.*—Neither a nonsuit,<sup>1</sup> nor a direction of a verdict<sup>2</sup> for the defendant, nor a demurrer to evidence,<sup>3</sup> is proper before the plaintiff has closed his case.<sup>4</sup>

But a motion to dismiss for insufficiency of the complaint may be made at any stage of the case<sup>5</sup> before evidence of the necessary facts omitted to be alleged has been received without specific objection.<sup>6</sup>

<sup>1</sup>Walker *vs.* Supple, 54 *Geo.*, 178.

s. p., Nixon *vs.* Brown, 4 *Blackf. (Ind.)*, 157.

<sup>2</sup>Miller *vs.* House, 63 *Iowa*, 82; s. c., 18 *Northw. Rep.*, 708.

<sup>3</sup>Proprietary *vs.* Ralston, 1 *Dall.*, 18.



<sup>4</sup>Not even where he has made a *prima facie* case against himself, if by evidence not conclusive against contradiction by him.

Miller vs. House, 63 Iowa, 82; s. c., 18 Northw. Rep., 708.

So, too, it is error to nonsuit at the close of the defendant's case without giving the plaintiff an opportunity to rebut or contradict defendant's evidence.

Metzger vs. Herman, 12 N. Y. Weekly Dig., 181.

<sup>5</sup>Scofield vs. Whitelegge, 49 N. Y., 259; s. c., 12 Abb. Pr., N. S., 320; aff'g 10 id., 104.

<sup>6</sup>Reck vs. Phoenix Ins. Co., 3 Civ. Pro. R. (Browne), 376, 379.

5. — *after strict cross-examination.*—The case may be taken from the jury after plaintiff's evidence is closed, although the defendant has cross-examined plaintiff's witnesses, if not going beyond strict cross-examination.

Eastman vs. Howard, 30 Me., 58; s. c., 50 Am. Dec., 611 (where the qualification above stated is not expressed, but implied).

The fact that defendant had set up a counter claim will not defeat his motion.

Slocum vs. Minneapolis Millers' Assoc. (Minn., 1885), 23 Northw. Rep., 862.

6. — *after full cross-examination.*—A defendant who has carried his examination of plaintiff's witnesses beyond the limits of a strict cross-examination, and brought out affirmative evidence properly part of his own case, cannot move for a nonsuit, etc., until plaintiff has had an opportunity of rebuttal.

This rule necessarily results from the nature and limits of the right to nonsuit.

7. — *after final close of case.*—The case may be taken from the jury on the whole evidence, including defendant's, after plaintiff's rebuttal.

Lomer vs. Meeker, 25 N. Y., 361.

Brown vs. Ins. Co., 59 N. H., 298.

And the judge may do this notwithstanding he had denied defendant's motion for a nonsuit at the close of plaintiff's case.

*Fitch vs. Hasler*, 54 *N. Y.*, 677.

These cases do not clearly indicate plaintiff's right to be heard in rebuttal (if defendant has given evidence in his own behalf, beyond strict cross-examination) before he can be nonsuited on defendant's evidence with his own, but the right is clear.

*Metzger vs. Herman*, 12 *N. Y. Weekly Dig.*, 181.

8. — *several co-defendants*.—One of several co-defendants may move for a nonsuit as to himself only.

So held even where another had defaulted; otherwise at common law.

*Lomer vs. Meeker*, 25 *N. Y.*, 361, and *cas. cit.*

9. — *several co-plaintiffs*.—A nonsuit may be granted as to one of several co-plaintiffs;<sup>1</sup> and it is error to grant it as to all, for misjoinder of an unnecessary plaintiff.<sup>2</sup>

<sup>1</sup>*Simar vs. Canaday*, 53 *N. Y.* 298 · s. c., 13 *Am. R.*, 523.

Otherwise at common law.

<sup>2</sup>*Id.*

*Fuller vs. Fuller*, 5 *Hun*, 595 (nonsuit refused though a joint action was brought on a several interest).

10. — *several causes of action*.—The fact that plaintiff has proved a cause of action not alleged in his complaint, does not prevent the granting of a nonsuit for an entire failure to prove the cause which was alleged,<sup>1</sup> unless the evidence was received without objection and was pertinent solely to the cause of action proved.<sup>2</sup>

<sup>1</sup>*Southwick vs. First Natl. B'k of Memphis*, 84 *N. Y.*, 420.

<sup>2</sup>*N. Y. Central Ins. Co. vs. National Ins. Co.*, 14 *N. Y.*, 85.

11. — *plaintiff's course to defeat motion*.—A motion for a nonsuit, or to direct a verdict, or a demurrer to evidence, though interposed on a sufficient ground, may be

defeated by the exercise of the common law right of submitting to a voluntary nonsuit,<sup>1</sup> or by getting leave of the judge to withdraw a juror,<sup>2</sup> or to reopen the case and give further evidence.<sup>3</sup>

<sup>1</sup>*Harris vs. Beam*, 46 *Iowa*, 118.

*Pleasants vs. Fant*, 23 *Wall.*, 116, 123.

*Pescud vs. Hawkins*, 71 *N. C.*, 299.

But not by asking to discontinue when the cause is called and without giving evidence.

*Duncan vs. De Witt*, 7 *Hun*, 184.

In some States voluntary nonsuit is discretionary with the Court; see pp. 106, 107, of this brief.

<sup>2</sup>*Van Syckles vs. Perry*, 3 *Robt.*, 621.

This application is discretionary.

<sup>3</sup>*Hunt vs. Maybee*, 7 *N. Y.*, 266, 273.

*May vs. Hanson*, 5 *Cal.*, 360.

*Abbey Homestead Assoc. vs. Willard*, 48 *Cal.*, 614.

*Wadsworth vs. Thompson*, 18 *Geo.*, 709.

*McColgan vs. McKay*, 25 *Geo.*, 631.

*Larman vs. Huey*, 13 *B. Mon. (Ky.)*, 436.

This application is discretionary.

*Hunt vs. Maybee*, 7 *N. Y.*, 266.

*Reed vs. Barber*, 3 *Code R.*, 160.

But a refusal to exercise discretion is error.

*Lewis vs. Ryder*, 13 *Abb. Pr., N. S.*, 1.

12. *Plaintiff's motion for a verdict.*—Where the question, after defendant's case is closed, is in like manner entirely one of law, the judge may direct a verdict for the plaintiff.

*Anderson Co. Commissioners vs. Beal*, 113 *U. S.*, 227, 241, and *cas. cit.*

*People vs. Cook*, 8 *N. Y.*, 67, 75.

*Bemis vs. Woodworth*, 49 *Iowa*, 340.

The motion cannot be granted before defendant's case is closed.

*Kingsford vs. Hood*, 105 *Mass.*, 495.

## C. RULES OF DECISION.

13. *Contents of pleading to be considered together.*—Where admissions in a pleading are relied on as a ground for taking the case from the jury, all the connected admissions and allegations must be taken together. It is not proper to direct a verdict if the effect of admissions is qualified by allegations on which defendant has a right to go to the jury.

Goodyear *vs.* De La Vergne, 10 *Hun*, 537.

14. *General rule as to assuming truth of adversary's evidence.*—On an application to take the case from the jury, whether by motion for a nonsuit,<sup>1</sup> or a direction of a verdict,<sup>2</sup> or by demurrer to evidence,<sup>3</sup> the evidence of the opposite party must be assumed to be true, and he is to be given the benefit of all legitimate inferences therefrom in his favor.

<sup>1</sup>Fairfax *vs.* N. Y. Cent. R. R. Co., 40 *Super. Ct. (J. & S.)*, 128; rev'd in 67 *N. Y.*, 11, on other grounds.

Myers *vs.* Dixon, 45 *How. Pr.*, 48; s. c., 35 *N. Y. Super. Ct. (J. & S.)*, 390.

Cook *vs.* N. Y. Cent. R. R. Co., 1 *Abb. Ct. App. Dec.*, 432.

Maynes *vs.* Atwater, 88 *Penn. St.*, 496.

Walker *vs.* Supple, 54 *Geo.*, 178, 180.

Frost *vs.* Gibson, 59 *Geo.*, 600, 602.

Smyth *vs.* Craig, 3 *Watts & S. (Penn.)*, 14.

Bevan *vs.* Ins. Co., 9 *id.*, 187.

<sup>2</sup>Parks *vs.* Ross, 11 *How. (U. S.)*, 373.

Purcell *vs.* English, 86 *Ind.*, 34.

Pratt *vs.* Stone, 10 *Ill. App.*, 633.

Bishops *vs.* McNary, 2 *B. Mon. (Ky.)*, 132; s. c., 36 *Am. Dec.*, 592.

Gallatin *vs.* Bradford, 1 *Bibb (Ky.)*, 209.

s. p., Stone *vs.* C. & N. W. R. R. Co., 47 *Iowa*, 82.

<sup>3</sup>Christie *vs.* Barnes (*Kans.*, 1885), 6 *Pac. Rep.*, 599, and *cas. cit.*

15. *Sufficiency of evidence*.—To authorize the submission of a question of fact to the jury, it is not enough that there was a mere scintilla of evidence.

*Baulec vs. N. Y. & Harlem R. R. Co.*, 59 *N. Y.*, 356; s. c., 17 *Am. R.*, 325; aff'g, in effect. 12 *Abb. Pr.*, *N. S.*, 310; 5 *Lans.*, 436, and 62 *Barb.*, 623.

*Commissioners vs. Clark*, 94 *U. S.* (4 *Otto*), 278, 284. In this case the Court say: "Decided cases may be found where it is held that if there is a scintilla of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to wit, that before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed."

*Raby vs. Cell*, 85 *Penn. St.*, 80 (where it is said that the rule that a scintilla of evidence must go to the jury has been justly exploded both in England and in Pennsylvania).

*Matlock vs. Mann*, 37 *Leg. Int.*, 349.

*Wittowsky, vs. Wasson*, 71 *N. C.*, 451.

*Nolan vs. Shickle*, 3 *Mo. App.*, 300.

And, in general, it may be said that even in those jurisdictions where the doctrine that a mere scintilla of evidence must go to the jury seemed to be well established, the tendency of recent decisions has been to repudiate it and to adopt the test laid down above (paragraph 3) and now applied in nearly all jurisdictions.

As illustrations of this change in the law, see the cases above, and compare

*Mercier vs. Mercier*, 43 *Geo.*, 323, 325, with

*Zettler vs. City of Atlanta*, 66 *Geo.*, 195; and

*Crookshank vs. Kellogg*, 8 *Blackf. (Ind.)*, 256, with

*Weis vs. City of Madison*, 75 *Ind.*, 241.

In a few States a scintilla of evidence is still allowed to go to the jury.

There are decisions to this effect in Arkansas, South Carolina, Iowa, Ohio, Illinois, and, it seems, in Kentucky and Nebraska.

*Little Rock & Fort Smith R. R. Co. vs. Perry*, 37 *Ark.*, 164.

*State vs. Boles*, 18 *So. Car.*, 534.

*Muldowney vs. Ill. Cent. R. R. Co.*, 32 *Iowa*, 176.

*Way vs. Ill. Cent. R. R. Co.*, 35 *Iowa*, 585 (where the Court says: "Where there is evidence tending in any degree to establish the cause of action, however slight it may be, the questions of fact involved in it should primarily be left to the jury to find. \* \* \* Hence it is the duty of a *nisi prius* Court in this State to submit the case to the jury upon the evidence when it only *tends even* to prove it, although the Court should feel in duty bound to set aside a verdict for the plaintiff, if the jury should so find. In other States a different and perhaps better and more consistent rule obtains whereby the Court may direct the jury how to find when it would set aside a verdict otherwise").

*Ellis vs. Ohio Life and Trust Co.*, 4 *Ohio St.*, 628, 645.

*Dick vs. Railroad Co.*, 38 *id.*, 389.

*Phelps vs. Jenkins*, 4 *Scam. (Ill.)*, 48.

*Chicago, etc., R. R. Co. vs. Sykes*, 96 *Ill.*, 162, 176.

*Pemberton vs. Williams*, 87 *Ill.*, 15.

*Guerdon vs. Corbett*, 87 *Ill.*, 272.

[For the conflict of opinion in *Kentucky*, see 5 *Ky. L. Rep.*, 503.]

*Smith vs. Sioux City, etc., R. R. Co.*, 15 *Nebr.*, 583; s. c., 19 *Northw. Rep.*, 638.

**But** even in those jurisdictions where the scintilla of evidence doctrine prevails, a total failure of evidence as to the whole case, or a total lack of evidence in support of some one essential element of the cause of action or defense renders it the duty of the Court to refuse to submit the case to the jury, and to either direct a nonsuit, or to instruct the jury how to find.

*Carrier vs. Dorrance*, 19 *So. Car.*, 30.

*Ellis vs. Ohio Life and Trust Co.*, 4 *Ohio St.*, 628, 646.

*Dick vs. Railroad Co.*, 38 *Ohio St.*, 389.

*Muldowney vs. Ill. Cent. R. R. Co.*, 32 *Iowa*, 176.

*Way vs. Ill. Cent. R. R. Co.*, 35 *Iowa*, 585.

*Phelps vs. Jenkins*, 4 *Scam. (Ill.)*, 48.

16. *Different inferences.*—It does not follow that because there is no contradictory testimony the Court must take the question from the jury and determine it as one of law. On the contrary, if different results would be reached by different minds the question must go to the jury.

*Wait vs. Agricultural Ins. Co.*, 13 *Hun*, 371 (action on a fire policy; the question being whether the house was "unoccupied").

So if a witness is contradicted by circumstances the question should go to the jury.

Elwood *vs.* Western Union Tel. Co., 45 *N. Y.*, 549, 554.

*s. p.*, Hackford *vs.* *N. Y. Centr.*, etc., *R. R. Co.*, 53 *id.*, 654.

Smith *vs.* Coe, 55 *id.*, 678 (facts, not simply evidence, must be clear).

Heyne *vs.* Blair, 62 *id.*, 19.

Morse *vs.* Erie *R. R. Co.*, 65 *Barb.*, 491.

Van Ostrand *vs.* O'Brien, 1 *Weekly Dig.*, 312.

Vinton *vs.* Schwab, 32 *Vt.*, 612 (where the question of defendant's negligence was held to have been properly submitted to the jury, although there was no conflict in the testimony).

Lindsay *vs.* Lindsay, 11 *Vt.*, 621.

Kane *vs.* Learned, 117 *Mass.*, 190, 194, and *cas. cit.*

Lane *vs.* *R. R. Co.*, 14 *Gray*, 143.

Kansas Pacific *R. R. Co. vs.* Painter, 14 *Kan.*, 37, 53 (citing *Railroad Co. vs. Stout*, 17 *Wall.*, 657, and *Detroit R. R. Co. vs. Van Steinberg*, 17 *Mich.*, 99).

Luke *vs.* Calhoun Co., 52 *Ala.*, 115 (to the effect that if the jury can draw any inferences from the plaintiff's evidence, fatal to his recovery, they should not be instructed to find for him, even though the evidence strongly tending to support his case is uncontradicted).

Dolfinger *vs.* Fishback, 12 *Bush (Ky.)*, 475 (where the rule is well stated).

*N. J. Express Co. vs.* Nichols, 3 *Vroom (N. J.)*, 166.

Atchison & Nebraska *R. R. Co. vs.* Bailey, 11 *Nebr.*, 332.

But although inferences are generally for the jury, yet where they are certain and incontrovertible the case may be decided as one of law by the Court.

Thurber *vs.* Harlem, etc., *R. R. Co.*, 60 *N. Y.*, 326, 331.

Dolfinger *vs.* Fishback 12 *Bush (Ky.)*, 475.

So, too, where an inference originally an inference of fact to be drawn or not, in the opinion of the jury, becomes in the course of commercial and legal experience obvious and well known, the Court are justified in treating it as a matter of law.

For instances see *Armstrong vs. Stokes*, *L. R.*, 7 *Q. B.*, 598, 605;

*Hutton vs. Bullock*, *L. R.* 8 *Q. B.*, 331, 334.

17. *Interested testimony.*—Where the only evidence sufficient upon an essential point is the testimony of the party in his own favor, or of a witness interested in his favor, it is error to refuse to submit the case to the jury.<sup>1</sup>

To constitute an interested witness within this rule it is not necessary that he should have a legal interest in the result of the litigation.<sup>2</sup>

<sup>1</sup>*Hodge vs. City of Buffalo*, 1 *Abb. N. C.*, 356; s. c., 1 *Buff. Super. Ct. (Sheldon)*, 418, and see *Elwood vs. Western Union Tel. Co.*, 45 *N. Y.*, 549, 554.

*Gildersleeve vs. Landon*, 73 *N. Y.*, 609.

*Nicholson vs. Connor*, 8 *Daly*, 21.

See also *Sheridan vs. Mayor, etc.*, *N. Y.*, 8 *Hun*, 424; reversed on other grounds in 68 *N. Y.*, 30.

<sup>2</sup>*Kavanagh vs. Wilson*, 70 *N. Y.*, 177 (where the only witness to prove a contract was a son of the plaintiff who was engaged in plaintiff's business upon a salary and was to be paid a fee in case the contract drawn by him "went through;" and hence held error to take the case from the jury and direct a verdict for the plaintiff).

And see also the recent case of *Wohlfahrt vs. Beckert*, 12 *Abb. N. C.*, 478; s. c., 92 *N. Y.*, 490 (where the interest of the witness, a clerk in the defendant's drug store, consisted in shielding himself and his employer from the charge of criminal negligence in omitting to label a poisonous drug which had caused the death of the plaintiff's intestate).

The same principle applies whether the testimony is to the whole case or to any specific fact essential to the case.

18. *Party's admission by refusal to testify.*—The refusal of a party to a suit, when testifying as witness, to answer a material question on the ground that it might criminate himself, is sufficient to go to the jury as evidence against him on the point inquired of, and makes it error to withdraw that question from them.

*Andrews vs. Frye*, 104 *Mass.*, 234.

19. *Direct met by circumstantial evidence.*—Where the direct evidence on one side, although uncontradicted,



is met by circumstantial evidence on the other, the question should be submitted to the jury.

*Babcock vs. Chicago & N. W. R. R. Co.*, 17 *Rep. (Iowa)*, 619; s. c., 1 *Am. L. J.*, 84.

s. p., *Artisans' Bank vs. Backus*, 36 *N. Y.*, 100.

But where positive testimony is met only by belief or impressions there is no conflict of evidence; and a finding is not conclusive, but against evidence, which rejects the former for the latter.

*Dresser vs. Van Pelt*, 1 *Hill. (N. Y.)*, 316.

20. *Affirmative testimony met only by negative*.—Affirmative testimony met only by negative testimony as to the same occurrence does not necessarily constitute such a conflict of testimony or raise such doubts as to require the question to be submitted to the jury.

*Culhane vs. N. Y. Central & H. R. R. Co.*, 60 *N. Y.*, 133.

*McKeever vs. The same*, 88 *id.*, 667; s. c., more fully, 14 *Weekly Dig.*, 226.

Compare *Byrne vs. The same*, 14 *Hun.*, 323.

*Cheney vs. The same*, 16 *Hun.* 415; and *Salter vs. Utica & Black River R. R. Co.*, 59 *N. Y.*, 631, rev'g without opinion 3 *Supm. Ct. (T. & C.)*, 800, and holding that negative testimony, as to the ringing of the bell of a locomotive, by witnesses who were giving attention, and who contradict positive testimony, makes a question on conflicting evidence proper for the jury.

21. *Positive, met only by a conclusion of law*.—Positive testimony met only by testimony to a conclusion of law does not constitute a conflict of testimony requiring the case to be submitted to the jury.

*Sanborn vs. Lefferts*, 16 *Abb. Pr., N. S.*, 42; s. c., 58 *N. Y.*, 179.

22. *Uncontradicted evidence of specific fact*.—Where a fact not improbable is positively testified to by unimpeached and uncontradicted witnesses not appearing to

be interested, it is error to submit it to the jury against objection.

Merely raising a question as to the credibility of a witness who is unimpeached does not take the case out of the rule.

*Robinson vs. McManus*, 4 *Lans.*, 380, 387 (as qualified by the rule in *Hodge vs. City of Buffalo*, 1 *Abb. N. C.*, 356.

*Newton vs. Pope*, 1 *Cow.*, 109; approved in 45 *N. Y.*, 553.

*Harriman vs. Queen Ins. Co.*, 49 *Wisc.*, 71.

*Berg vs. Chicago, Milwaukee, etc., R. R. Co.*, 50 *Wisc.*, 419.

*Scott vs. Clayton*, 54 *id.*, 499.

*Lange vs. Perley*, 47 *Mich.*, 352.

So too it is error to submit a question of fact to the jury when there is no evidence in support of it, or where the evidence is all one way.

*Alger vs. Gardner*, 54 *N. Y.*, 60.

*Insurance Co. vs. Baring*, 20 *Wall.*, 159, 162.

*Meguire vs. Corwine*, 101 *U. S.* (11 *Otto*), 108, 111.

*United States vs. One Still*, 5 *Blatchf.*, 403.

22<sup>a</sup>. *Expert testimony*.—The testimony of experts on a point to which other witnesses would not be competent to testify, if positive, to a matter of fact, and not mere matter of opinion on facts laid before the jury, is within the above rule; but if the question is not one which only experts are capable of determining, or their testimony is matter of opinion on facts before the jury, the question must be submitted to the jury.

I understand this to be the practical test, although the distinction is not made clear by the reported cases:

Compare:

*Leitch vs. Atlantic Mut. Ins. Co.*, 66 *N. Y.*, 100, 108;

*Cornish vs. Farmbuildings Fire Ins. Co.*, 74 *N. Y.*, 295, 298.

Where the evidence of a party on an essential point consists mainly of the testimony of experts it seems that

the case should go to the jury, unless the testimony leaves no reasonable doubt of the facts in issue.

*Spensley vs. Lancashire Ins. Co.*, 11 *Ins. L. J.*, 383, citing *Copp vs. German-American Ins. Co.*, 51 *Wisc.*, 643 (where the reason assigned is, that there are usually elements of doubt, uncertainty and inconclusiveness in expert testimony which it is for the jury to pass upon).

23. *Nominal damages*.—A motion for nonsuit is properly denied if plaintiff is entitled to recover even nominal damages.

*Van Rensselaer vs. Jewett*, 2 *N. Y.*, 135.

*Weber vs. Kingsland*, 8 *Bosw.*, 415.

*Lillie vs. Hoyt*, 5 *Hill (N. Y.)*, 395; *s. c.*, 40 *Am. Dec.*, 360.

24. *Mode of taking case from jury*.—In those jurisdictions where compulsory nonsuit or dismissal of complaint is allowed, the Court should not, against plaintiff's objection, direct a verdict for the defendant instead of ordering a non-suit, unless the ground for taking the case from the jury is such as to constitute a final bar to plaintiff's cause of action.

*Briggs vs. Waldron*, 83 *N. Y.*, 582; *affg* 9 *Weekly Dig.*, 219.

#### D. VERDICT SUBJECT TO OPINION OF COURT (SPECIAL CASE).

25. *When may be directed*.—Where the facts are indisputable, and only questions of law are raised, and no exceptions have been taken the determination of which could affect the proofs, the judge may direct the jury to render a verdict, subject to the opinion of the Court.

*N. Y. Code Civ. Pro.*, § 1185.

*Howell vs. Adams*, 68 *N. Y.*, 314; *affg* 1 *Supm. Ct. (T. & C.)*, 425.

13 *Abb. N. C.*, 382, *note*.

*s. p.*, *Baylis vs. Travelers Ins. Co.*, 113 *U. S.*, 31

The effect is that in entering the verdict it is expressed to be subject to the opinion of the Court; and this will prevent judgment on the verdict until the Court have passed on the questions of law, and leaves it in the power of the trial judge, on subsequent motion, to set aside the verdict on the ground of the insufficiency of the evidence.

*Baylis vs. Travelers Ins. Co.*, 113 *U. S.*, 316.

In this case MATTHEWS, J., says: "If, after the plaintiff's case had been closed, the Court had directed a verdict for the defendant on the ground that the evidence, with all inferences that the jury could justifiably draw from it, was insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, it would have followed a practice sanctioned by repeated decisions of this Court. \* \* \* \* \*

Or, if in the present case, a verdict having been taken for the plaintiff by direction of the Court, subject to its opinion whether the evidence was sufficient to sustain it, the Court had subsequently granted a motion on behalf of the defendant for a new trial, and set aside the verdict, on the ground of the insufficiency of the evidence, it would have followed a common practice, in respect to which error could not have been alleged, or it might, with propriety, have reserved the question, what judgment should be rendered, and in favor of what party, upon an agreed statement of facts, and afterwards rendered judgment upon its conclusions of law. But, without a waiver of the right of trial by jury, by consent of parties, the Court errs if it substitutes itself for the jury, and, passing upon the effect of the evidence, finds the facts involved in the issue, and renders judgment thereon" (Judgment reversed for error in so doing). See also, 13 *Abb. N. C.*, 382, *note*.

Under the New York Statute, the judge, on motion at the same term as the trial, may order judgment on the verdict or may set aside the verdict and direct judgment for either party.

*N. Y. Code Civ. Pro.*, § 1185.

26. *Contest as to facts.*—A verdict may be directed, subject to the opinion of the Court, when the evidence as matter of law leaves no question of fact for the jury, although counsel still controvert the facts.

*McBride vs. Farmers Bank*, 26 *N. Y.* 450; *aff'g* 25 *Barb.*, 657.

27. *Questions of evidence.*—Under the New York statute it is error to direct that the verdict be subject to the opinion of the Court, even upon failure to object, if exceptions have been taken on questions of evidence, or if there is a conflict of evidence to go to the jury.<sup>1</sup>

If there are any questions of fact for the jury, a verdict subject to the opinion of the Court cannot be directed even if accompanied with answers by the jury to special questions determining the facts.<sup>2</sup>

<sup>1</sup>*Purchase vs. Matteson*, 25 *N. Y.*, 211; s. c., 15 *Abb. Pr.*, 402.

*Matson vs. Farm Buildings Ins. Co.*, 73 *N. Y.*, 310; s. c., 29 *Am. R.*, 149; rev'g 9 *Hun*, 415.  
13 *Abb. N. C.*, 382, *note*.

The question whether there is sufficient evidence to go to the jury may be reserved.

*Wilde vs. Trainor*, 59 *Penn. St.*, 439.

*Koons vs. Western Union Tel. Co.*, 102 *Id.*, 164.

<sup>2</sup>*Gilbert vs. Beach*, 16 *N. Y.*, 606 (but *query*?).

28. *Determining amount.*—The verdict directed must determine the amount of recovery, if any, as well as indicate the successful party. The determining of amount cannot be reserved for a reference.

*Buchanan vs. Cheeseborough*, 5 *Duer*, 238.

*Belden vs. Davies*, 2 *Hall*, 433.

But see *Bartels vs. Redfield*, 16 *Fed. Rep.*, 336, where this was done.

29. *Effect of consent.*—A verdict may be directed, subject to the opinion of the Court, notwithstanding exceptions taken, if the parties agree as to the facts, thereby waiving all exceptions.

*Byrnes vs. City of Cohoes*, 67 *N. Y.*, 204, 207.

## XVI.—COUNSEL'S ADDRESS TO THE JURY.

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|--|---|
| 1. Election as to cause of action.                   | 17. Use of document not in evidence.            |
| 2. The right to address the jury.                    | 18. Document not formally read.                 |
| 3. — third person.                                   | 19. Misuse of evidence.                         |
| 4. Right to close.                                   | 20. Nonsuited cause of action.                  |
| 5. When to be asked.                                 | 21. Reading medical and other scientific books. |
| 6. Number of counsel.                                | 22. Reading previous proceedings in the cause.  |
| 7. Length of argument.                               | 23. Stating or reading the law.                 |
| 8. Asking jury to take notes.                        | 24. Interrupting for correction.                |
| 9. Right, notwithstanding conflicting evidence.      | 25. Judge may interpose.                        |
| 10. Evidence which was incompetent.                  | 26. Recalling witness or re-reading document.   |
| 11. Comments on kind of evidence.                    | 27. Amending.                                   |
| 12. — on form of deposition.                         | 28. Re-opening.                                 |
| 13. — on objections and rulings.                     |   |
| 14. — counter explanations.                          |   |
| 15. Referring to the pleadings                       |   |
| 16. Stating what is not in evidence,—<br>aspersions. |   |

1. *Election as to cause of action*.—At the close of the evidence, if the pleading states the same substantial cause of action in different forms or counts and the evidence applies to both, the Court may require plaintiff to elect which count he will rely on,<sup>1</sup> or may allow him to change an election previously made.<sup>2</sup>

<sup>1</sup>Roberts vs. Leslie, 46 *Super. Ct. (J. & S.)*, 76.

<sup>2</sup>McLennan vs. McDermid, 52 *Mich.*, 468; s. c., 18 *Northw. Rep.*, 222.

2. *The right to address the jury*.—When there is a question of fact to be submitted to the jury, a party has the right to be heard in argument to the jury within the limits hereafter stated; and an exception lies to the refusal of the right.

Cartright vs. Clopton, 25 *Geo.*, 85, 88 (holding it would be error to refuse to allow anything more than "stating his points").

The *dictum* to the contrary, in *People vs. Cook*, 8 *N. Y.*, 67, 77, is unsound.

But if he does not avail himself of the opportunity when offered, it is in the discretion of the Court whether afterwards to allow him to address the jury.

*Herrington vs. Pouley*, 26 *Ill.*, 94.

When the Court direct a verdict fixing its nature and extent, it is not error to refuse to allow argument to the jury.

*Harrison vs. Park*, 1 *J. J. Marsh. (Ky.)*, 170.

3. — *third person*.—*Amicus curiæ* is not entitled to be heard where the parties are attended by competent counsel; nor is counsel in another cause between other parties entitled to be heard merely because the same question arises in both.

*Nauer vs. Thomas*, 13 *Allen*, 572, 574.

4. *Right to close*.—He who holds the affirmative on the issues which are to be submitted to the jury has the right to close.<sup>1</sup>

But if the party having such affirmative has failed to produce any evidence, it is not error to give the right to close to the other party.<sup>2</sup>

<sup>1</sup>*Mead vs. Shea*, 92 *N. Y.*, 122.

*Page vs. Carter*, 8 *B. Mon. (Ky.)*, 192.

*Daviess vs. Arbuckle*, 1 *Dana (Ky.)*, 525.

*Williams vs. Allen*, 40 *Ind.*, 295.

Even though the other party gave no evidence.

*Worsham vs. Goar*, 13 *Ala. (4 Port.)*, 441.

<sup>2</sup>*Zehner vs. Kepler*, 16 *Ind.*, 290, 294.

*Young vs. Haydon*, 3 *Dana (Ky.)*, 145.

There has been much the same conflict of authority on this question as in respect to the right to open. See Division IV. of this Brief.

5. *When to be asked*.—A request for a ruling on the order in which counsel shall address the jury can prop-

ly be made only after the whole evidence is in,<sup>1</sup> and before arguments are heard.<sup>2</sup>

<sup>1</sup>*Mead vs. Shea*, 92 *N. Y.*, 122, 124.

<sup>2</sup>*McKibbon vs. Folds*, 38 *Geo.*, 235, 239.

6. *Number of counsel.*—Only one counsel on each side is heard,<sup>1</sup> except that where several defendants appear by separate attorneys and have separate counsel, they will each be heard, unless their interests are in unison, in which case the Court may require them to select one of the counsel to be heard for all.<sup>2</sup>

<sup>12</sup> *Tidd's Pr.*, 2 *Am.* (from 8th *Lond. ed.*), 909.

*Grah. Pr.*, 742.

*N. Y. Rule*, 29 of 1884.

<sup>2</sup>*Sodousky vs. McGee*, 4 *J. J. Marsh. (Ky.)*, 267.

7. *Length of argument.*—The length of time to be occupied may be limited by the Court in the exercise of a sound discretion.<sup>1</sup> For an abuse of the discretion an exception lies.<sup>2</sup>

<sup>1</sup>*Trice vs. Hannibal & St. Jo. R. R. Co.*, 35 *Mo.*, 416.

*Burson vs. Mahoney*, 6 *Baxt. (Tenn.)*, 304, 307.

<sup>2</sup>*White vs. People*, 90 *Ill.*, 117 (criminal case).

8. *Asking jury to take notes.*—It is irregular to allow counsel to procure jurors to take notes of his calculations or other statements in argument, and to permit them to take out memoranda made on counsel's suggestion.

*Indianapolis, etc., R. R. Co. vs. Miller*, 71 *Ill.*, 463 (reversing judgment for this and other errors).

9. *Right, notwithstanding conflict in evidence.*—Counsel has a right to argue to the jury upon facts as to which there is a conflict of evidence, if there be evidence to go to the jury.

*Logan vs. Munroe*, 20 *Me.*, 257.



10. *Evidence which was incompetent.*—Counsel has a right to argue to the jury on facts as to which evidence has been received without objection, although the evidence may have been incompetent.

*Free vs. State*, 1 *McMull.* (So. Car.), 494 (criminal case).

11. *Comments on kind of evidence.*—Counsel has a right to comment on the bias of a witness;<sup>1</sup> on the fact that a person shown to be an important witness for the adverse party, and within reach, was not called on his behalf;<sup>2</sup> and that the adverse party failed to appear as a witness in his own behalf,<sup>3</sup> or that he has failed to put in evidence documents shown to be within his power and to contain relevant evidence.<sup>4</sup>

<sup>1</sup>*Central R. R. Co. vs. Mitchell*, 63 *Geo.*, 173, 180.

<sup>2</sup>*Gavigan vs. Scott*, 51 *Mich.*, 373; s. c., 16 *Northw. Rep.*, 769. And see p. 152 of this Brief.

*Gray vs. Burk*, 19 *Tex.*, 228, 233.

<sup>3</sup>Even where the omission was pursuant to stipulation. *Hurd vs. Marple*, 10 *Ill. (App.)*, 418, 424.

<sup>4</sup>*Huntsman vs. Nichols*, 116 *Mass.*, 521, 526.

For the rule in *Maine*, see *Tobin vs. Shaw*, 45 *Me.*, 331.

12. — *on form of deposition.*—The mode in which interrogatories put to a witness are framed and put is a proper subject of comment by counsel.

*Smiley vs. Burpee*, 5 *Allen (Mass.)* 568.

13. — *on objections and rulings.*—Counsel has no right to comment to the jury on the objection of the opposite party to evidence, and the judge's ruling thereon.

*Mitchell vs. Borden*, 8 *Wend.*, 570.

14. — *counter explanations.*—It is not error to allow counsel of a party whose course in the non-production of evidence promised in his opening has been commented

on by the adverse counsel, to state the reasons for such error.

Blake *vs.* People, 73 *N. Y.*, 586.

15. *Referring to the pleadings.*—It is not error to allow counsel to refer to or read from the pleadings for the purpose of showing the jury what are the questions in issue.<sup>1</sup>

But it is not a matter of right to read the pleadings to the jury unless they have been put in evidence.<sup>2</sup>

<sup>1</sup>Rowe *vs.* Comley, 1 *City Ct.*, 466; s. c., 2 *Civ. Pro. R. (Browne)*, 424 (saying that a party has a right in summing up to refer to the pleadings).

But not to a pleading superseded by amendment and not in evidence.

Payne *vs.* Kings Co. Mfg. Co., 2 *Hun*, 673.

<sup>2</sup>See Division XI. of this Brief.

16. *Stating what is not in evidence,—aspersions.*—If counsel states as facts matters which are not in evidence,<sup>1</sup> or uses language calculated to humiliate and degrade the adverse party without foundation in the evidence, or language calculated to arouse prejudice in the jury irrelevant to the case,<sup>2</sup> the adverse party may interpose, and if the Court refuses to check the abuse, an exception lies.

<sup>1</sup>Rolfe *vs.* Rumford, 66 *Me.*, 564, and *cas. cit.*

Hall *vs.* Wolff, 61 *Iowa*, 559; s. c., 16 *Northw. Rep.*, 709.

Brown *vs.* Swineford, 44 *Wisc.*, 282; s. c., 28 *Am. R.*, 582.

Festner *vs.* Omaha & S. W. R. R. Co. (*Nebr.*, 1885), 22 *Northw. Rep.*, 559.

But dates fixed by the records of the Court may be stated to the jury as facts.

Andrews *vs.* Graves, 1 *Dill.*, 108.

Festner *vs.* Omaha & S. W. R. R. Co. (*above*).

Tucker *vs.* Henniker, 41 *N. H.*, 317, 322.

<sup>2</sup>Coble *vs.* Coble, 79 *N. C.*, 589; s. c., 28 *Am. R.*, 338.

Fry *vs.* Bennett, 3 *Bosw. (N. Y.)*, 200.

17. *Use of document not in evidence.*—It is error to allow counsel to use with the jury documents that have not been put in evidence.

Union Central Life Ins. Co. *vs.* Cheever, 36 *Ohio St.*, 201 s. c., 38 *Am. R.*, 573.

Koelges *vs.* Guardian Life Ins. Co., 57 *N. Y.*, 63 (reading from pamphlet proved to have been issued by defendant).

McKeever *vs.* Weyer, 11 *Weekly Dig.*, 258 (exhibiting cartoon or caricature).

18. *Document not formally read.*—It is not indispensable that a document put in evidence should have been actually read or handed to the jury before closing the evidence. But the Court may allow it to be read during the argument, the adverse party being then allowed to give evidence in rebuttal or explanation, if surprised.<sup>1</sup>

The judge has power to allow a document which proves itself to be produced on the argument, if the omission to do so before is excused, and the adverse party not prejudiced.<sup>2</sup>

<sup>1</sup>Harter *vs.* Seaman, 3 *Blackf. (Ind.)*, 27.

Binder *vs.* State, 5 *Iowa*, 457.

O'Reilly *vs.* Duffy, 105 *Mass.*, 243.

Carlyon *vs.* Lannan, 4 *Nev.*, 156.

s. p., Clapp *vs.* Wilson, 5 *Den.*, 285 (trial before referees).

Compare as to the right to have it go to the jury in the same way, Duke *vs.* Cahawba Nav. Co., 10 *Ala.*, 82; s. c., 44 *Am. Dec.*, 472.

<sup>2</sup>Bank of Charleston *vs.* Emeric, 2 *Sandf.*, 718.

19. *Misuse of evidence.*—Evidence admitted for a specific purpose counsel cannot use for a purpose for which it would have been inadmissible.

Coleman *vs.* People, 55 *N. Y.*, 81, 88.

Dilleber *vs.* Home Life Ins. Co., 10 *Weekly Dig.*, 180.

Cole *vs.* Cole, 5 *id.*, 453.

20. *Nonsuited cause of action.*—If plaintiff is non-suited as to one of several causes of action he cannot use evidence, which was directly relevant only to the non-suited cause of action, in support of the other.

*Meyer vs. Cullen*, 54 *N. Y.*, 392.

21. *Reading medical and other scientific books.*—It is error to allow counsel in addressing the jury to read statements from a book of inductive science,<sup>1</sup> unless what so read has been received in evidence.

It is not enough that the book has been shown by expert testimony to be a standard work.<sup>2</sup>

<sup>1</sup>*Washburn vs. Cuddihy*, 8 *Gray (Mass.)*, 430.

*Yoe vs. People*, 49 *Ill.*, 410.

*People vs. Wheeler*, 9 *Pac. Coast L. J.*, 581; s. c., 14 *Rep.*, 111.

*Boyle vs. State of Wisconsin*, 57 *Wisc.*, 472; s. c., 15 *Northw. Rep.*, 827, and cas. cit.

For other cases see 59 *Am. Dec.*, 180, note.

There is an exception where counsel avoids reading statements of fact, and confines himself to borrowing argument which he might properly have used if it had originated with himself.

Mr. Moak's art., in 24 *Alb. L. J.*, 266 (sound though questioned in *id.*, 284).

"Reason is neither more nor less than reason, because it happens to be read from a book."

HOVEY, J. *Cory vs. Silcox*, 6 *Ind.*, 39, 40.

s. p., *Legg vs. Drake*, 1 *Ohio St.*, 286; approved in 36 *id.*, 201, s. c., 38 *Am. R.*, 573.

<sup>2</sup>*Stilling vs. Town of Thorp*, 54 *Wisc.*, 528; s. c., 41 *Am. R.*, 60.

22. *Reading previous proceedings in the cause.*—Counsel has not a right to read to the jury previous proceedings in the same cause,<sup>1</sup> except that he may quote the opinion of an appellate Court on a question of law, only as matter of argument.<sup>2</sup>

<sup>1</sup>*Bell vs. McMaster*, 29 *Hun*, 272.

*Baker vs. City of Madison (Wisc., 1885)*, 22 *Northw. Rep.*, 141.

Butler vs. Slane, 50 *Penn. St.*, 456, 459 (error to allow charge on former trial to be read).

Allaire vs. Allaire, 39 *N. J. L.*, 113 (but error to allow opinion of appellate Court as to weight or credibility of evidence to be read).

Crawford vs. Morris, 5 Gratt., 90, 104 (error to allow opinion as to admissibility of evidence to be read).

Good vs. Mylin, 13 *Penn. St.*, 538.

For the *Georgia* rule under statute see *Douglass vs. Boynton*, 59 *Geo.*, 283, 285.

<sup>2</sup>Allaire vs. Allaire, 39 *N. J. L.*, 113, 114.

“Plainly counsel, in his address to the jury, can, for the purpose of presenting his views of the law of his case, call to his aid and quote the language delivered from the bench” (per BEASLEY, C. J., *ib.*).

In *State vs. Hoyt*, 46 *Conn.*, 333, 338; s. c., 38 *Am. R.*, 580, reading the whole opinion was sanctioned in a criminal case where the facts seemed necessary to understand the law, and the jury are judges of law and fact.

s. p., *Noble vs. McClintock*, 6 *Serg. & R.*, 58; explained in 13 *Penn. St.*, 538.

23. *Stating or reading the law.*—Counsel has the right to state his views of the law to the jury by way of argument of the questions of fact to be submitted to them, except that he is not entitled to argue against any ruling already made upon the trial, and provided that it be understood that the jury are to take the law from the instructions of the judge, and not from counsel.<sup>1</sup>

Allowing counsel against objection to go beyond this limit in reading from law books is error.<sup>2</sup>

<sup>1</sup>*Rex vs. Courvoisier*, 9 *Carr. & P.*, 362.

And see *Allaire vs. Allaire*, 39 *N. J. L.*, 113, 114.

[*Contra* in *Illinois*, *City of Chicago vs. McGiven*, 78 *Ill.*, 347, 350 (holding it error to allow the reading of decisions to the jury)].

<sup>2</sup>*Porter vs. Choen*, 60 *Ind.*, 338.

*State vs. Klinger*, 46 *Mo.*, 224.

*Gilbertson vs. Miller Mining, etc., Co.* (*Utah*, 1885), 5 *Pac. Rep.*, 699.

24. *Interrupting for correction.*—Counsel has a right to interpose, during the argument of adverse counsel, to object to his mis-stating the evidence or transcending the limits of argument.

Long *vs.* State, 12 *Geo.*, 293, 330.

But not to his assuming, as proved, that as to which there is a conflict of testimony.

Hatcher *vs.* State, 18 *Geo.*, 460 (criminal case).

25. *Judge may interpose.*—It is proper for the Court, of its own motion, to interpose in restraint of counsel transgressing these rules.

Melvin *vs.* Easeley, 1 *Jones (Nor. Car.)*, 386, 388.

Tucker *vs.* Henniker, 41 *N. H.*, 317, 323.

St. Louis & S. E. R. R. Co. *vs.* Myrtle, 51 *Ind.*, 566, 577, and *cas. cit.*

26. *Recalling witness or re-reading document.*—The judge may recall a witness during the summing up, when a question is made as to what his testimony was, or if the witness is not at hand, may refer to the notes of the judge or of the stenographer.<sup>1</sup>

It is not error to refuse delay for the purpose of finding a document which has been mislaid.<sup>2</sup>

<sup>1</sup>Long *vs.* State, 12 *Geo.*, 293.

So held where the judge's notes were kept pursuant to direction of statute.

<sup>2</sup>McLendon *vs.* Frost, 57 *id.*, 448, 459.

27. *Amending.*—Under a statute permitting pleadings to be amended "on" the trial, an amendment may be allowed during the argument. On the trial means before the close of it.

Franklin Fire Ins. Co. *vs.* Findlay, 6 *Whart.*, 483; s. c., 37 *Am. Dec.*, 430.

28. *Re-opening*.—The judge has power in his discretion to allow the case to be re-opened and further evidence taken, even after argument closed.<sup>1</sup> But the adverse party should be allowed to rebut it.<sup>2</sup>

<sup>1</sup>*George vs. Pilcher*, 28 *Gratt. (Va.)*, 299, 310, and *cas. cit.*  
*Darland vs. Rosencrans*, 56 *Iowa*, 122.  
*Commissioners vs. Slatter*, 52 *Ind.*, 171 (argument closed, except plaintiffs).

<sup>2</sup>*George vs. Pilcher*, 28 *Gratt. (Va.)*, 299.

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## XVII.—THE INSTRUCTIONS.

[The statutes existing in many of the states restraining the judge's instructions, are so diverse and so diversely construed, and so well understood each in their own locality, that I have not thought it best to take the necessary space to state them; and I have been confirmed in this by the impression that they chiefly are due to causes that may not be generally permanent, and will be likely to give way in course of time.

In respect to "Special verdicts" and "Special questions," the reader will find much confusion in the language of the reports, answers to special questions being often called special verdicts. As the two proceedings are entirely distinct (although putting special questions is a convenient substitute for asking a special verdict), it may be useful here to make clear my use of these expressions. A special verdict, properly so-called, is a finding of facts, with conclusion in the alternative, that if upon these facts the law is for plaintiff, the jury find for plaintiff, if upon these facts it is for defendant, the jury find for defendant. The jury have, in certain cases, a right to find thus specially on all or any of the issues, and this enables them sometimes to agree in appearance and be discharged, while, in reality, disagreeing, those in favor of an absolute verdict one way being content to accompany it with a special verdict which those opposed to the general verdict think will vindicate their view.

The putting of special questions is an analogous mode of requiring the jury to find on any facts in issue; and though it may have a similar effect it has great advantage in defining the pivotal facts so as to enable the court to apply the law with more justice than a general verdict would.

The finding of the jury in either case is, in a general sense, a "special" verdict; but it is more convenient for clearness in stating the rules here, to confine the term special verdict to what was known as such at common law; and to designate answers given under the more modern method of putting questions, as "special findings."]

## A. GENERAL RULES.

1. Power of Court.
2. State Statutes in United States Courts.
3. Right of request.
4. Complex request.
5. Amended or substituted requests.
6. Requiring written request, — time.
7. Right of counsel to see.

## B. INSTRUCTIONS AS TO PLEADINGS AND EVIDENCE.

8. Pleadings.
9. Separate defenses.
10. Superfluous allegation.
11. Burden of proof.
12. Presumption of law.
13. Presumption of fact.
14. Specific fact.
15. Instructions as to the evidence: — no evidence.
16. — disregarding evidence.
17. Sufficiency of evidence.
18. Result of testimony.
19. Circumstantial evidence.
20. Alternative propositions.
21. Misuse of evidence.
22. Affirmative and negative testimony.
23. Testimony of party, when his only evidence.
24. — when contradicted by himself.
25. Conflict between adverse parties' testimony.
26. Omission to call a witness.
27. Refusal to produce document.
28. Cumulative evidence.
29. Unimpeached and uncontradicted testimony.
30. Impeached testimony.
31. *Falsus in uno.*

## 32. Incredible fact.

## 33. Expressing opinion on weight.

## 34. — —

## 35. Construction and effect of writing.

## 36. Requisite cogency of evidence.

## 37. — as to crime.

## 38. Doubtful rule of law.

## C. INSTRUCTIONS RELATING TO EFFECT OF VERDICT.

## 39. Interest on actual damages.

## 40. Double or treble damages.

## 41. Informing jury as to effect of verdict, — on costs, — on imprisonment.

## D. FURTHER REQUESTS, AND EXCEPTIONS.

## 42. Further instructions.

## 43. Exception to charge.

## 44. — to variance from request.

## 45. When to be taken.

## E. SPECIAL VERDICT.

## 46. Right of jury to render special verdict.

## 47. Power of judge to require it.

## 48. Parties may draft the special verdict.

## 49. Right of jury to frame their own.

## F. SPECIAL QUESTIONS.

## 50. Power to put special questions.

## 51. — when to be put.

## 52. Nature and form of questions.

## 53. — inspection and objection.

## 54. Withdrawing.

## G. SEALED VERDICT.

## 55. Power of court.



## A. GENERAL RULES.

1. *Power of Court.*—In the absence of statute to the contrary the judge has power to instruct the jury *sua sponte*; but it is in his discretion whether to do so or not, if neither party request it.

*Pennock vs. Dialogue*, 2 *Pet.*, 1, 15; affg 4 *Wash.*, 538.

*Haupt vs. Pohlman*, 16 *Abb. Pr.*, 301, 307; s. c., 1 *Robb.*, 121.

2. *State statutes in United States Courts.*—State laws prescribing the manner in which the judge shall discharge his duty in charging the jury, or the papers which he will permit to go to them in their retirement, or the requiring the jury to answer special interrogatories in addition to their general verdict, do not apply to the Courts of the United States.

*Indianapolis & St. Louis R. R. Co. vs. Horst*, 93 *U. S.* (3 *Otto*), 291.

*Nudd vs. Burrows*, 91 *U. S.* (1 *Otto*), 426.

*U. S. vs. Train*, 12 *Fed. Rep.*, 852.

For these regulations the local statutes should be consulted.

In the absence of any regulation requiring it, the judge's instructions need not be reduced to writing, except to the extent necessary for enabling counsel to except.

*Smith vs. Crichton*, 33 *Md.*, 103, 108.

3. *Right of request.*—A party has a right to submit a question of law arising on undisputed facts or upon a hypothetical statement within the scope of the evidence, and have the instruction of the Court given to the jury thereon; and it is error to refuse to listen to a timely request so to do.

*Chapman vs. McCormick*, 86 *N. Y.*, 479.

4. *Complex request.*—When instructions are asked in the aggregate, or a series of propositions are presented

as one request, the whole may properly be rejected by the Court if there is anything exceptionable in either of them.

Indianapolis, etc., R. R. Co. *vs.* Horst, 93 *U. S.* (3 *Otto*), 291, and *cas. cit.*

Caldwell *vs.* Murphy, 11 *N. Y.*, 416.

5. *Amended or substituted requests.*—After unreasonable requests have been rejected, it may still be error to refuse to listen to specific requests which would have been proper if made alone in the first instance.

DeBost *vs.* Albert Palmer Co., 35 *Hun*, 386.

6. *Requiring written request, — time.*—The Court have power to require that instructions asked for must be presented before argument made to the jury,<sup>1</sup> and in writing.<sup>2</sup>

But, notwithstanding such a limit of time, counsel acting in good faith has a right, after the judge has instructed the jury and before they have retired, to request him to correct an error or supply a deficiency.<sup>3</sup>

<sup>1</sup> *Manhattan Life Ins. Co. vs. Francisco*, 17 *Wall.*, 672, 678.

*Ela vs. Cockshott*, 119 *Mass.*, 416, 418.

<sup>2</sup> *Manhattan Life Ins. Co. vs. Francisco*, (*above*).

Good practice requires that counsel desiring to request instructions, should present their requests to the judge in separate and distinct propositions, fairly and legibly written, before the judge begins his charge.

If the presentation of requests is delayed until after the judge has charged the jury, he may not unreasonably require them to be presented orally, or by reading them, he responding to each as read, or he may, in his discretion, require them to be first submitted to the adverse counsel, and then charge those that are consented to and determine whether or not to charge those that are not consented to.

<sup>3</sup> *Crippen vs. Hope*, 38 *Mich.*, 344.

*s. p.*, *Chapman vs. McCormick*, 86 *N. Y.*, 479.

See also paragraph 40, *below*.

7. *Right of counsel to see.*—Counsel has a right to see or hear his requests to charge which are presented by adversary.

This right is essential to secure a fair trial, both because no communication in the course of the trial should be received by the judge from either side in exclusion of the other, and because the omission to comply with a proper request of the adversary is not unfrequently fatal to a just and otherwise regular verdict.

The right stated in the text is recognized by Tinkham *vs.* Thomas, 34 *Super. Ct. (J. & S.)*, 237.

#### B. INSTRUCTIONS AS TO PLEADINGS AND EVIDENCE.

8. *Pleadings.*—The Court should not refer the jury to the pleadings for information as to what the issues are.

Bryan *vs.* Chicago, R. I., etc., R. R. Co., 63 *Iowa*, 464; s. c., 19 *Northw. Rep.*, 295.

Hollis *vs.* State Ins. Co. (*Iowa*, 1884), 21 *Northw. Rep.*, 774.

9. *Separate defenses.*—If a defense in abatement is joined in the same answer with a defense in bar, the plaintiff may require that the jury be instructed to render separate verdicts.

Gardner *vs.* Clark, 21 *N. Y.*, 399, 401.

10. *Superfluous allegation.*—A plaintiff is entitled to go to the jury on a cause of action on contract substantially alleged and supported by evidence, notwithstanding a failure to prove commingled allegations of tort.

Graves *vs.* Waite, 59 *N. Y.*, 156.

[*Contra*, under the *N. Y. Code Civ. Pro.*, § 549, subd. 4, when the tort is a fraud in contracting or incurring the liability, such as constitutes a ground of arrest.]

11. *Burden of proof.*—It is error to instruct the jury that plaintiff, by giving evidence of a *prima facie* case, has shifted the burden of proof to defendant.<sup>1</sup>

But if plaintiff has given evidence such as to raise a legal presumption of the existence of the fact alleged, it is not error for the Court to instruct the jury that, in weighing the whole evidence together, they may consider that the plaintiff has given *prima facie* evidence in support of his case and such as is conclusive if uncontradicted, and that this must be contradicted or disproved by a preponderance of evidence on the part of defendant, or the plaintiff is entitled to recover.<sup>2</sup>

<sup>1</sup> *Heinemann vs. Heard*, 62 *N. Y.*, 448, 455; *rev'g 2 Hun*, 324; *s. c.*, 4 *Supm. Ct. (T. & C.)*, 666.

<sup>2</sup> *Crane vs. Morris*, 6 *Pet.*, 598, 620.

*Kelly vs. Jackson, Id.*, 622, 631.

*Heilman vs. Lazarus*, 12 *Abb. N. C.*, 19; *s. c.*, less fully, 90 *N. Y.*, 672; *in full*, 65 *How. Pr.*, 95.

This rule does not apply when that which is claimed to be a *prima facie* case rests on testimony which raises a question of credibility of witnesses for the jury.

12. *Presumption of law.*—It is error to refuse to state to the jury what is the presumption of law on a material point in the absence of proof, though the adverse party has already introduced evidence sufficient to sustain a verdict contrary to such presumption, if such evidence be not sufficient to require the jury to find contrary to the presumption.

*Potter vs. Chadsey*, 16 *Abb. Pr.*, 146.

A statute prohibiting a judge from charging on a matter of fact, does not forbid his instructing them that a presumption arising in the case is entitled to great weight.

*Durant vs. Burt*, 98 *Mass.*, 161.

But instructions as to presumptions should be so framed as not to confuse or mislead the jury by neglecting to discriminate between disputable and indisputable presumptions, nor to give them as a presumption, without qualification, that which only justifies an inference either way, that is to say, which is only a presumption of fact.

13. *Presumption of fact.*—In a State in which it is the practice of the State Courts to indicate the opinion of the judge as to what inferences are fairly deducible from the testimony, it is proper for Courts of the United States to do the same.

Mitchell *vs.* Harmony, 13 How. (U. S.), 115, 130.

14. *Specific fact.*—A peremptory instruction to the jury is not erroneous if the evidence respecting it is of such a conclusive character as would compel the Court in the exercise of a sound legal discretion, to set aside a verdict in opposition to such evidence,<sup>1</sup> but after the judge has made a full and fair charge, he is not bound, though requested by counsel, to instruct them for which party to find, if they find one way or the other as to particular facts in the case.<sup>2</sup>

<sup>1</sup>Montclair *vs.* Dana, 107 U. S. (17 Otto), 162.

<sup>2</sup>Rexter *vs.* Starin, 73 N. Y., 601.

15. *Instructions as to the evidence:—no evidence.*—It is the duty of the Court to inform the jury, if requested, when there is no evidence of a material fact, unless the complexity of oral evidence renders it more proper to instruct them hypothetically.<sup>2</sup>

<sup>1</sup>Storey *vs.* Brennan, 15 N. Y., 524.

But the slightest evidence from which the jury may properly infer the fact is enough to preclude such instruction.

Bond *vs.* Warren, 8 Jones (Nor. Car.) L., 192.

<sup>2</sup>Knox *vs.* Fair, 17 Ala., 503.

16. — *disregarding evidence.*—The Court may instruct the jury to disregard evidence wrongly admitted, although it was admitted without objection and has not been struck out.<sup>1</sup>

But a party cannot ask such an instruction, as matter right, who did not object as soon as the ground of objection was known to him.<sup>2</sup>

<sup>1</sup> *Pennsylvania Co. vs. Roy*, 102 *U. S.* (12 *Otto*), 451, 458.

*People vs. Parish*, 4 *Den.*, 153.

*s. p.*, *Morton vs. Beall*, 2 *Har. & G. (Md.)*, 136.

[*Contra*, *Becker vs. Becker*, 45 *Iowa*, 239 (on the ground that omitting to object led the other party to rely on its going to the jury, instead of supplying better evidence).]

Whether instructions will cure the error is another question.

<sup>2</sup> *Edge vs. Keith*, 21 *Miss.* (13 *S. & M.*), 295.

*Ganson vs. Tift*, 71 *N. Y.*, 48, 56.

*Rees vs. Livingston*, 41 *Penn. St.*, 113.

*McInroy vs. Dwyer*, 47 *id.*, 118.

*Harrison vs. Young*, 9 *Geo.*, 359, 366.

[*Contra*, *Hamilton vs. N. Y. Central, etc., R. R. Co.*, 51 *N. Y.*, 100, 106; *Barnett vs. St. Anthony Falls, etc., Co.* (*Minn.*, 1885), 22 *Northw. Rep.*, 535, 538.]

This rule, which I state thus in deference to recent authority, leaves it in the discretion of the judge whether to instruct the jury to disregard or not. If this be sound, the discretion should be controlled by the following distinction; If the objection goes to the means of evidence or the manner of proof,—as for instance, the competency of a witness, or of oral in lieu of written evidence, or the authentication of a document, or to remoteness in point of time or place, on a question of value,—the omission to object or move to strike out should generally be deemed a waiver, giving the adversary, who might have supplied the defect on timely objection, a right to have the evidence go to the jury. But if the objection goes to the substantial relevancy of the fact proved, that is to say, its intrinsic capacity to afford any fair ground of an inference affecting the issue, it ought not to be deemed waived.

17. *Sufficiency of evidence.*—It is error to tell the jury, without qualification, that the evidence raises a presumption of a particular fact, or is sufficient to justify finding a particular fact, if it raises not a presumption of law, but only a presumption of fact on which they might find either way.

*Stone vs. Geyser*, 52 *Cal.*, 315.

*Allison vs. State*, 42 *Ind.*, 354, 357.

*s. p.*, *Read vs. Hurd*, 7 *Wend.*, 408.

18. *Result of testimony*.—It is not error to refuse to instruct the jury that if they believe a specified witness they should find for the party for whom he testified.

Chapman vs. Erie R. R. Co., 55 N. Y., 579; rev'g 1 Supp. Ct. (T. & C.), 526.

Dolan vs. Delaware, etc., Canal Co., 71 N. Y., 285.

Bailey vs. Bailey, 97 Mass., 373.

But it is not necessarily error to instruct them that the testimony of a witness, if believed, establishes a fact, the testimony is clear, and they are given to understand they may believe or not.

Russell vs. Ely, 2 Black, 575.

s. p., where the conflicting witnesses were the parties, Bellew vs. Ahsburg, 23 Kans., 287.

19. *Circumstantial evidence*.—Where the circumstances together are sufficient to sustain the finding of fact, the adverse party has no right to require that the jury be instructed that separately not one of them is sufficient.

Scott vs. Lloyd, 9 Pet., 418, 460.

Keenan vs. Hayden, 39 Wisc., 558, 561.

20. *Alternative propositions*.—A party is entitled to have specific charges upon the law applicable to each of the various hypotheses or combinations of facts which the jury from the evidence might legitimately find, and which have not been covered by other instructions.

Sword vs. Keith, 31 Mich., 247, 255.

Foster vs. People, 50 N. Y., 598 (criminal case).

21. *Misuse of evidence*.—A party has a right to have the jury instructed that evidence admitted only for a specific purpose cannot be regarded by them for another purpose for which it was incompetent.

Henson vs. King, 2 Jones (Nor. Car.), L., 385.

s. p., Williams vs. Mech. & Trav. Fire Ins. Co., 54 N. Y., 577.

Weir vs. McGee, 25 Tex. Supp., 20, and see p. 138 of this Brief, paragraph 19.

22. *Affirmative and negative testimony.*—It is not error to instruct the jury in an appropriate case that it is a rule of presumptions that ordinarily a witness who testifies to an affirmative is to be preferred to one who testifies to a negative, because he who testifies to a negative may have forgotten. It is possible to forget a thing that did happen. It is not possible to remember a thing that never existed.

*Stitt vs. Huidekopers*, 17 *Wall.*, 384, 394.

23. *Testimony of party, when his only evidence.*—Where the only evidence of a party is his testimony in his own behalf, it is error to instruct the jury that if not probable nor discredited they must find for him.

*Lesser vs. Wunder*, 9 *Daly*, 70.

s. P., p. 127 of this Brief, paragraph 17.

The well-established rule, followed by the English Court of Chancery, that no one can, on his own testimony (*Whittaker vs. Whittaker*, 21 *Law Reports [Chan. Div.]*, 657; s. c., 30 *Weekly Rep.*, 787), unsupported by corroborative evidence, sustain a claim against the estate of a deceased person,—may be satisfied by corroborative evidence of the acts of the parties and by their documents.

*Young vs. Wallingford* [*Chan. Div.*, May, 1883], 48 *L. T. R., N. S.*, 756.

24. — *when contradicted by himself.*—A party's testimony in his own behalf is entitled to no consideration if it is flatly contradicted by his own previous writings.

*Boyd vs. Colt*, 20 *How. Pr.*, 384.

It was held in *Juinata Building Assoc. vs. Hetzel*, 103 *Penn. St.*, 507, that in an equity case the uncorroborated testimony of a party impeaching his own written testimony, or varying its effect, is not sufficient to go to the jury.

*Lynch vs. Pyne*, 24 *Super. Ct. (J. & S.)*, 11.

25. *Conflict between adverse parties' testimony.*—Where the evidence is the conflicting testimony of plain-



tiff and defendant, each in his own behalf, it is error to instruct the jury that to the extent of the conflict, the party having the burden of proof must fail.

*Kuehn vs. Wilson*, 13 *Wisc.*, 104, 109.

*Salter vs. Glenn*, 42 *Geo.*, 64, 82.

s. p., p. 127 of this Brief, paragraph

26. *Omission to call a witness.*—The mere omission to call a competent and available witness who has some knowledge of the transactions, which if the claim of the party omitting is correct would be favorable, and who is not adversely interested or biassed, is a circumstance which the jury may consider;<sup>1</sup> but it is error to instruct them, even when such witness is a party on the same side, that they may infer that his testimony, if he were produced, would be favorable to the other party.<sup>2</sup>

<sup>1</sup> *Reynolds vs. Sweetser*, 15 *Gray*, 78, 79.

*Bleecker vs. Johnston*, 69 *N. Y.*, 509; rev'g 51 *How. Pr.*, 380.

It is error to instruct the jury that a party is bound to call a particular witness who seems to be able to explain evidence against him, if such witness is interested against the party.

*Coykendall vs. Eaton*, 42 *How. Pr.*, 378.

<sup>2</sup> *Bleecker vs. Johnston*, 69 *N. Y.*, 509; rev'g 51 *How. Pr.*, 380.

There is much conflict of opinion on the question whether the judge may comment on the absence of supposed testimony or documents. Compare

*Nicol vs. Crittenden*, 55 *Geo.*, 497.

*Lowe vs. Massey*, 62 *Ill.*, 47.

*Moore vs. Wright*, 90 *id.*, 470.

*Brooks vs. Steen*, 6 *Hun.*, 516.

*Steininger vs. Hoch*, 42 *Penn. St.*, 432.

*Miller vs. Dayton*, 57 *Iowa*, 423.

*Frick vs. Barbour*, 64 *Penn. St.*, 120.

*American Underwriters' Assoc. vs. George*, 97 *id.*, 238.

*Seward vs. Garlin*, 33 *Vt.*, 583.

*Clough vs. Patrick*, 37 *id.*, 421.

*Daub vs. N. P. R. Co.* (*U. S. Circ. Ct., Oreg.*), 1. *Fed. Rep.*, 625.

27. *Refusal to produce document.*—A party who refuses on request to produce a document shown to be within his control, thereby raises a presumption that if produced it would have tended to support the evidence which the other party, in the absence of the document, is compelled to rely upon.

*Clifton vs. U. S.*, 4 *How. (U. S.)*, 242 (holding the rule to apply even where there is no question of best and secondary).

*Wylde vs. Northern R. R. of N. J.*, 14 *Abb. Pr., N. S.*, 213; s. c., 53 *N. Y.*, 156.

28. *Cumulative evidence.*—If a party has called one witness his neglect to call another to the same point, though a circumstance to be considered in weighing the evidence that is actually adduced, cannot be given to the jury as a ground for inferring that the testimony of the other might be prejudicial.

*Bleecker vs. Johnston*, 59 *N. Y.*, 509; rev'g 51 *How. Pr.*, 380.

29. *Unimpeached and uncontradicted testimony.*—The general rule that the positive testimony of an unimpeached, uncontradicted witness cannot be disregarded by the jury,—does not apply to the testimony of an interested witness, nor to one whose testimony is intrinsically improbable, or contradicted by circumstances;<sup>1</sup> nor to testimony to a matter of common opinion on facts that are before the jury.<sup>2</sup>

<sup>1</sup>*Koehler vs. Adler*, 78 *N. Y.*, 287.

<sup>2</sup>See Division XV. of this Brief, paragraph 22a.

30. *Impeached testimony.*—The testimony of a witness who has been impeached should go to the jury, not with an instruction to disregard it wholly, but to be weighed in connection with the other evidence.<sup>1</sup>

Whether a witness has been successfully impeached or not is a question for the jury.<sup>2</sup>

<sup>1</sup>White *vs.* McLearn, 57 N. Y., 670.

Dunn *vs.* People, 29 *id.*, 523.

<sup>2</sup>Allis *vs.* Leonard, 58 N. Y., 288.

31. *Falsus in uno*.—Where a witness testifying to matters material to the issues, as to which deliberate false swearing would be perjury, is contradicted by other witnesses, it is not erroneous for the judge to charge the jury that if they believe the witness has knowingly sworn falsely in reference to any fact, he is not entitled to be believed in reference to any other fact testified to by him.<sup>1</sup>

But a party is not entitled to have the jury so instructed unless his falsehood is shown to be willful; but the judge should only caution the jury.<sup>2</sup>

<sup>1</sup>Roth *vs.* Wells, 29 N. Y., 471; aff'g 41 *Barb.*, 194.  
s. p., People *vs.* Evans, 40 N. Y., 1.

<sup>2</sup>Pease *vs.* Smith, 61 N. Y., 477; aff'g 5 *Lans.*, 519.  
Koehucke *vs.* Ross, 16 *Abb. Pr.*, N. S., 345, with note.

32. *Incredible fact*.—Testimony to an intrinsically improbable fact may be disbelieved by the jury, although the witness was uncontradicted and unimpeached.

Stillwell *vs.* Carpenter, 2 *Abb. N. C.*, 238 (testimony to good faith).

Stafford *vs.* Leamy, 34 N. Y. *Super. Ct.* (*J. & S.*), 269, and *cas. cit.*

Tracy *vs.* Town of Phelps (*U. S. Circ. Ct.*, N. D. N. Y., 1885), 1 *Kans. L. J.*, 38.

33. *Expressing opinion on weight*.—In a State in which the course of practice adopted by the State Courts does not forbid the presiding judge to express his opin-

a upon questions of fact, to the jury, a judge of a United States Court may do so.

*Mitchell vs. Harmony*, 13 *How. (U. S.)*, 115.

The rule for those jurisdictions has been well stated thus:

Where the judge intends, in commenting on facts, merely to indicate an opinion on a question which he leaves to the jury, the proper form of charge is to tell the jury that the cause of action or defense, as the case may be, rests upon a question which the judge specifies, and that it is for them to judge from the evidence whether the fact be one way or the other, and if they should be of the opinion one way they must find for the defendants, and if they thought otherwise, they must find for the plaintiffs.

If then, the judge deems proper to give his opinion on the fact, for the assistance or satisfaction of the jury, he may do so with utility and safety.\*

But if he tells the jury that the matters given in evidence are conclusive on the one side, and the matters given in evidence on the other are not sufficient, and that if the jury agree with him in opinion they ought to find so and so, without more, it is error.

*Firemen's Ins. Co. vs. Walden*, 12 *Johns.*, 513; s. c., 7 *Am. Dec.*, 340.

s. p., *Gordon vs. Little*, 8 *Serg. & R.*, 533; s. c., 11 *Am. Dec.*, 632.

*Allis vs. Leonard*, 58 *N. Y.*, 288.

*Massoth vs. Delaware & H. C. Co.*, 64 *id.*, 524, 533.

[\**Contra*, *Vedder vs. Fellows*, 20 *N. Y.*, 126, 130].

34. — —. It is not error to refuse to express an opinion on the sufficiency of evidence, if the evidence is not sufficient to warrant a peremptory ruling in favor of the party relying on it.

*Moore vs. Meacham*, 10 *N. Y.*, 207.

35. *Construction and effect of writing.*—The construction and effect of writings, if the question arises only from the writings themselves, is for the Court.<sup>1</sup> If it depends in part on oral evidence, the question is for the jury.<sup>2</sup>

If the extrinsic facts are ambiguous, the jury should be told what would be the proper construction upon several different states of facts they might find.<sup>3</sup>

<sup>1</sup>Stokes vs. Johnson, 57 N. Y., 673.

Goddard vs. Foster, 17 Wall., 123.

<sup>2</sup>Etting vs. Bank of U. S., 11 Wheat., 59, 76.

Barreda vs. Silsbee, 21 How. (U. S.), 146.

First National Bank vs. Dana, 79 N. Y., 108, 116.

Goddard vs. Foster, 17 Wall., 123.

<sup>3</sup>Curtis vs. Martz, 14 Mich., 506.

36. *Requisite cogency of evidence.*—On a jury trial of a civil issue, the issue must be determined by a preponderance of evidence;<sup>1</sup> and it is error to instruct the jury that the evidence must be clear, satisfactory and conclusive, although the question be one which, if tried in equity, would require that degree of proof.<sup>2</sup>

<sup>1</sup>Various substitutes for "preponderance of evidence," such as "weight of evidence," "balance of probabilities," etc., in telling the jury they must be "satisfied," etc., have been held error in some cases, though sanctioned and harmless in others.

<sup>2</sup>Holt vs. Brown, 63 Iowa, 319; s. c., 19 Northw. Rep., 235.

[Contra, Brawdy vs. Brawdy, 7 Penn. St., 157.

Juinata Building Assoc. vs. Hetzel, 103 Penn. St., 507.]

Which of these rulings is sound is too broad a question for discussion here. I state the rule as in the text in deference to what I understand to be the general practice in New York; but it is a question of radical importance under the new procedure which merges cases of law and equity, and it seems to have escaped adequate consideration in reported cases.

In Piersol vs. Neill, 63 Penn. St., 420, 426, the Pennsylvania rule was thus stated: "If in the opinion of the former [the judge] the facts are not such as should move a chancellor to decree specific execution of the contract, he should give a binding instruction to that effect to the jury, and withdraw the case from them: if the case should be sufficient on the testimony, then the jury should be so instructed, and the testimony referred to them to find whether it be true or not."

37. — *as to crime.*—An allegation of a criminal act, when made in a civil action tried before a jury, is proved by a preponderance of evidence, weighed with the presumption of innocence; it is error to instruct the jury that it must be proved beyond a reasonable doubt.

This is the better opinion.

See *Abb. Tr. Ev.*, 495, where the conflicting cases are classified.

*N. Y. Guaranty, etc., Co. vs. Gleason*, 7 *Abb. N. C.*, 334, 352, and note at p. 357; s. c., 78 *N. Y.*, 503.

*Johnson vs. Agricultural Ins. Co.*, 25 *Hun*, 251 (followed in 95 *N. Y.*, 562).

To the contrary, *Stephens Dig.*, Art. 94, and cases cited in authorities above mentioned.

38. *Doubtful rule of law.*—Where the case turns on a doubtful question of law, the judge may let it go to the jury under instructions in accordance with apparent authority, so as to settle the question of fact and then grant an order for new trial, on appeal from which the question can be reviewed.

*Dickenson vs. Edwards*, 2 *Abb. N. C.*, 300.

#### C. INSTRUCTIONS RELATING TO EFFECT OF VERDICT.

39. *Interest on actual damages.*—In actions of tort, the judge may leave it to the jury whether to allow interest upon the damages, or not, but should not instruct them to allow it.

*Walrath vs. Redfield*, 18 *N. Y.*, 457.

*Black vs. Camden & Amboy R. R. Co.*, 45 *Barb.*, 40.

40. *Double or treble damages.*—Where the law gives double, treble or other increased damages, the verdict should find single damages as such, unless otherwise

directed by the statute, and the Court will direct judgment thereon at the increased rate.

*Newcombe vs. Butterfield*, 8 *Johns.*, 342.

*King vs. Havens*, 25 *Wend.*, 420.

*Warren vs. Doolittle*, 5 *Cow.*, 678.

*N. Y. Code Civ. Pro.*, § 1184.

41. *Informing jury as to effect of verdict, — on costs — on imprisonment.*—The judge may, in his discretion, inform the jury what will be the effect of a verdict, in respect to carrying costs,<sup>1</sup> or to justifying execution against the person;<sup>2</sup> but it is not error to refuse to do so.

<sup>1</sup> *Waffle vs. Dillenback*, 38 *N. Y.*, 53; s. c., more fully, 4

*Abb. Pr.*, *N. S.*, 457; aff'g 39 *Barb.*, 123.

*Nolton vs. Moses*, 3 *Barb.*, 31.

<sup>2</sup> *Keller vs. Strasburger*, 90 *N. Y.*, 379; aff'g 23 *Hun.*, 625.

<sup>3</sup> *Id.*

#### D. FURTHER REQUESTS, AND EXCEPTIONS.

42. *Further instructions.*—It is error for the judge to refuse to listen to requests for further instructions on specific points, merely because he has already instructed the jury<sup>1</sup>; but when the charge already given covers the entire case, and submits it properly to the jury, the Court may refuse to give further instructions.<sup>2</sup>

<sup>1</sup> Paragraph 5, above.

*Pfeffe vs. Second Ave. R. R. Co.*, 34 *Hun.*, 497, and cas. cit.

<sup>2</sup> *Indianapolis, etc., R. R. Co. vs. Horst*, 93 *U. S.* (3 *Otto*), 291.

*Holbrook vs. Utica, etc., R. R. Co.*, 12 *N. Y.*, 236.

*Rexter vs. Starin*, 73 *N. Y.*, 601.

43. *Exception to charge.*—An exception to the entire charge, or to a series of propositions in it, in gross, does

ot require attention, if any portion of what is excepted is sound.

*Beaver vs. Taylor*, 93 *U. S.* (3 *Otto*), 46.

*Jones vs. Osgood*, 6 *N. Y.*, 233.

44. — *to variance from request.*—An exception does not require attention if it does not indicate the precise point of the supposed error, but leaves it to the judge to compare the requests and the charge to ascertain what modifications are desired.

*Beaver vs. Taylor*, 93 *U. S.* (3 *Otto*), 46.

*Ayrault vs. Pacific Bank*, 47 *N. Y.*, 570, 576.

45. *When to be taken.*—An exception to the charge must be taken before the jury have rendered their verdict. It must, at the time when taken, be reduced to writing by the exceptant, or entered in the minutes.

*N. Y. Code Civ. Pro.*, § 995.

*Phelps vs. Mayer*, 15 *How.* (*U. S.*), 160.

It is a convenient practice to suggest to counsel that the taking of exceptions which do not involve requests for further instructions be postponed until the jury have gone out.

### E. SPECIAL VERDICT.

46. *Right of jury to render special verdict.*—Where the jury have a right to render a special verdict, a refusal to instruct them that they have such right is error.

*Adams & Co's Express vs. Pollock*, 12 *Ohio St.*, 618.

By the New York Statute the jury have this right, in any action to recover a sum of money only, or real property, or a chattel.

*N. Y. Code Civ. Pro.*, § 1187.

The right to render a special verdict is not necessarily taken away by a statute allowing special questions to be put.

*Hendrickson vs. Walker*, 32 *Mich.*, 68.



47. *Power of judge to require it.*—By the *New York Statute*, in any other action than one for money only, or real property, or a chattel, unless the trial is of issues which have been previously settled for trial by jury, the judge may direct the jury to find a special verdict upon any or all of the issues.

*N. Y. Code Civ. Pro.*, § 1187.

*Id.* The reference to specific questions of fact, etc., in the statute is to §§ 970, 971, of *N. Y. Code Civ. Pro*

Under such a statute the power is discretionary.

Cleveland, etc., *R. R. Co. vs. Terry*, 8 *Ohio St.*, 570, 586.

According to *Peck vs. Snyder*, 13 *Mich.*, 21, the judge cannot require answers to special questions, unless authorized by statute.

“The correct practice in rendering a special verdict is that the jury find the facts of the case and refer the decision of the cause upon these facts to the Court, with a conditional conclusion, that if the Court should be of opinion, upon the whole matter as found, that the plaintiff is entitled to recover, then they find for the plaintiff, but if otherwise, they find for defendant. By leave of the Court such a verdict may be prepared by the parties, subject to the correction of the Court, and it may include agreed facts in addition to those found by the jury. When the facts are settled and the verdict is reduced to form, it is then entered of record, and the questions of law arising on the facts so found are then before the Court for hearing, as in case of a demurrer.”

*Mumford vs. Wardwell*, 6 *Wall.*, 423.

See also *Burr. Pr.*, 247; 2 *Tidd's Pr.*, 897; 12 *Ct. of Cl.*, 565.

The power of the Court to give such direction is usually discretionary.

48. *Parties may draft the special verdict.*—It is not the duty of the judge to prepare a draft special verdict to submit to the jury; but where a party has a right to require such a verdict the judge must, if requested in a proper case, give each party adequate opportunity to do so.

*Pittsburg, etc., R. R. Co. vs. Ruby*, 38 *Ind.*, 294, 310.

*Hopkins vs. Stanley*, 43 *id.*, 553, 558 (so holding under a statute giving each party the right to demand a special verdict).

s. p., *Miller vs. Shackelford*, 4 *Dana (Ky.)*, 264, 271.

49. *Right of jury to frame their own.*—The jury, whom a draft special verdict is submitted, may modify, or frame one themselves;<sup>1</sup> and should be instructed that they may do so.<sup>2</sup>

<sup>1</sup>*Pittsburg, etc., R. R. Co. vs. Ruby*, 38 *Ind.*, 294, 310 (*dictum*).

*Hopkins vs. Stanley*, 43 *id.*, 553, 558 (so held even under the Indiana statute, which gives each party the right to demand a special verdict).

<sup>2</sup>*Miller vs. Shackleford*, 4 *Dana (Ky.)*, 264, 270.

But if their finding is not sufficiently definite the Court may require them to amend it.

*Kansas Pac. R. R. Co. vs. Pointer*, 14 *Kans.*, 37, 51.

#### F. SPECIAL QUESTIONS.

50. *Power to put special questions.*—The Court has power, unless otherwise provided by statute, to require a jury on rendering a general verdict to find specially upon any question of fact in the issues submitted to them.<sup>1</sup> So long as is in the discretion of the judge,<sup>2</sup> both in respect to the form and the substance of the questions,<sup>3</sup> unless made matter of right by the statute.<sup>4</sup>

<sup>1</sup>*McMasters vs. Westchester Mut. Ins. Co.*, 25 *Wend.*, 379.

*Barstow vs. Sprague*, 40 *N. H.*, 27, 33 (not error to do so against objection).

*Dyer vs. Greene*, 23 *Me.*, 464.

*Spaulding vs. Robbins*, 42 *Vt.*, 90, 93.

[*Contra*, *Peck vs. Snyder*, 13 *Mich.*, 21 (holding it not error to refuse to require it).]

Statutes requiring instructions to be in writing do not necessarily apply to such a direction.

*Callister vs. Mount*, 73 *Ind.*, 559, 567.

<sup>2</sup>This is the rule under the New York statute; same in California.

*N. Y. Code Civ. Pro.*, § 1187.

<sup>3</sup>*Hackford vs. N. Y. Central, etc., R. R. Co.*, 53 *N. Y.*, 654.

*Forrest vs. Forrest*, 6 *Duer*, 102; s. c., 3 *Abb. Pr.*, 144.

*American Co. vs. Bradford*, 27 *Cal.*, 360, 365.

Under this statute the judge cannot require it except in connection with a general verdict.

Commissioners *vs.* Kromer, 8 *Ind.*, 446, 449 (under statute making questions a matter of right).

<sup>4</sup>As in several of the Western States.

See Allen *vs.* Davison, 16 *Ind.*, 416.

A State statute making it matter of right does not apply in the Courts of the United States.

Indianapolis & St. Louis R. R. Co. *vs.* Horst, 93 *U. S.* (3 *Otto*), 291.

51. — *when to be put.*—In the absence of special provision, the Court may fix the time for submitting special questions,<sup>1</sup> and may refuse to receive them if unseasonably put.<sup>2</sup>

<sup>1</sup>Even where, as in Indiana, the putting of such questions is matter of right.

Malady *vs.* McEnary, 30 *Ind.*, 273, 277.

<sup>2</sup>*Id.* (holding refusal to receive during charge not error).

Burleson *vs.* Burleson, 28 *Tex.*, 383, 411 (holding refusal to receive further question after jury had returned with their verdict, not error).

Lambert *vs.* McFarland, 7 *Nev.*, 159 (holding refusal to put questions first offered after jury were ready with verdict, not error).

52. *Nature and form of questions.*—The judge should not allow a question to be put to the jury which is not material,<sup>1</sup> nor one which calls for evidence<sup>2</sup> or a conclusion of law.<sup>3</sup>

But it is no objection that a question is leading.<sup>4</sup>

<sup>1</sup>Crane *vs.* Reeder, 25 *Mich.*, 303.

Maxwell *vs.* Boyne, 36 *Ind.*, 120.

Hatfield *vs.* Lockwood, 18 *Iowa*, 296.

<sup>2</sup>Hatfield *vs.* Lockwood (*above*).

Adams *vs.* Louisville & N. R. R. Co. (*Ky.*, 1885), 6 *Ky. L. Rep.*, 687.

<sup>3</sup>Hatfield *vs.* Lockwood, 18 *Iowa*, 296.

<sup>4</sup>Rice *vs.* Rice, 6 *Ind.*, 101.

But it is not error to refuse to put as a question, whether there are any allegations in the complaint which are not true, and if so, what.

*Morse vs. Morse*, 25 *Ind.*, 156.

53. — *inspection and objection.*—The Court have power to require each party to submit his proposed questions to the other.<sup>1</sup>

Objection to a question is too late after it has been answered.<sup>2</sup>

<sup>1</sup>This point seems to have been involved in *Malady vs. McNary*, 30 *Ind.*, 273, 277; and it is the better opinion that a party has a right to see the questions proposed by his adversary, at any rate unless they are excluded by the judge.

<sup>2</sup>*Brooker vs. Weber*, 41 *Ind.*, 426.

54. *Withdrawing.*—Where the power of the judge to put special questions is discretionary he may, in his discretion, withdraw them before they have been answered.<sup>1</sup>

Where it is matter of right, he cannot withdraw a proper question against objection of the party at whose instance it was regularly put.<sup>2</sup>

<sup>1</sup>*Taylor vs. Ketchum*, 5 *Robt. (N. Y.)*, 507.

*Moss vs. Priest*, 19 *Abb. Pr.*, 314, 316 (*dictum*).

<sup>2</sup>*Otter Creek Block Coal Co. vs. Raney*, 34 *Ind.*, 329.

It is error to instruct the jury that in the absence of sufficient evidence as to any question, they might so state without further answer to it.

*Crane vs. Reeder*, 25 *Mich.*, 303 (COOLEY, J.).

*Harriman vs. Queen Ins. Co.*, 49 *Wisc.*, 71 (holding not error to instruct them that where they could not say yes they might say no).

In *Maxwell vs. Boyne*, 36 *Ind.*, 120, it is held that where the evidence is evenly balanced this rule should be applied, but there is a *dictum* that where there is no evidence the jury may say they cannot answer.

See Division XX., par. 16, etc., and XXI., par. 6.

## G. SEALED VERDICT.

55. *Power of the Court.*—The judge may in his discretion, upon consent of the parties, or if no objection be made, authorize the jury to bring in a sealed verdict.

*Douglass vs. Tousey*, 2 *Wend.*, 352; s. c., with note, 20 *Am. Dec.*, 616.

*High vs. Johnson*, 28 *Wisc.*, 72.

*Parmlee vs. Sloan*, 37 *Ind.*, 469.

s. p., *Warner vs. N. Y. Central, etc., R. R. Co.*, 52 *N. Y.*, 437, 440; s. c., 11 *Am. R.*, 724.

There is some authority for holding that it is in his discretion to do so even against objection, or without opportunity to make objection; and that this will not be error unless abuse of discretion or some resulting prejudice to the party is shown.

*Green vs. Bliss*, 12 *How. Pr.*, 442 (dictum that judge may without consent).

*State vs. Engle*, 13 *Ohio*, 490 (recommending caution to jurors not to disclose contents nor converse about it till opening).

*Evans vs. Foss*, 49 *N. H.*, 490 (officer by mistake told jury that sealed verdict was directed).

*State vs. Weber*, 22 *Mo.*, 321 (jury volunteered to render sealed verdict).

*Lucas vs. Marine*, 40 *Ind.*, 289 (judge sent direction from hotel in absence of counsel).

## XVIII.—DOCUMENTS FOR THE JURY.

- |   |                                 |
|---|---------------------------------|
| 1. General rule as to documents<br>in evidence. | 2. — used, but not in evidence. |
|   | 3. Several documents.           |
- 

1. *General rule as to documents in evidence.*—In the absence of a statute to the contrary,<sup>1</sup> the judge may in his discretion allow documents (except, in most of the states, depositions)<sup>2</sup> which have been admitted in evidence to be taken by the jury when retiring to deliberate upon their verdict,<sup>3</sup> unless objected to because written upon or underscored to call attention to special portions of them.<sup>4</sup>

<sup>1</sup>In *Nudd vs. Burrows*, 91 *U. S.* (1 *Otto*), 426, it was held not error for a judge of the United States Court to refuse to follow a state statute allowing the jury to take out documentary evidence other than depositions.

In *Alabama*,<sup>a</sup> *California*,<sup>b</sup> *Colorado*,<sup>c</sup> *Delaware*,<sup>d</sup> *Illinois*,<sup>e</sup> *Iowa*,<sup>f</sup> *Nevada*,<sup>g</sup> *New Jersey*,<sup>h</sup> *Oregon*,<sup>i</sup> *Minnesota*,<sup>j</sup> and *Texas*,<sup>k</sup> there are statutes which, in general, provide that all papers received in evidence, except depositions, may be taken by the jury when retiring to deliberate upon their verdict. In *Alabama*, however, the statute provides that depositions may be taken out; and in *Iowa* a deposition may be taken out if all the evidence is in writing and no part of the deposition has been excluded; but in *New Jersey* the statute is silent as to depositions. In *Colorado*, accounts and account books are excepted. In *California*, *Nevada*, *Colorado*, *Minnesota* and *Oregon* it is provided that the jury may take out copies of such papers, or of parts of such public documents given in evidence as ought not in the opinion of the Court to be taken from the person having them in possession.

In *California*, *Nevada*, *Colorado*, *Minnesota* and *Oregon* it is provided that the jury may take out notes of the testimony taken by themselves or any of them, but none taken by any other person. In *Alabama*, *Illinois* and *Texas* the written instructions to the jury may be taken out; and this is held mandatory in *Alabama* (*Ala. Code* [1876], § 3109; *Miller vs. Hampton*, 37 *Ala.*, 342).

But in general it seems that these statutes are directory merely, and that it would not be error for the Court in its discretion to refuse to allow the jury to take out any papers.

See the recent case of *People vs. Cochran*, 61 *Cal.*, 548, where that view is taken of the California Statute.

In Maine it is provided that if either party purposely introduces an improper paper among those given to the jury when they retire, the Court may set aside the verdict on motion of the adverse party (*Me. Rev. Stat.* 1871, p. 650, § 79).

<sup>a</sup>*Ala. Code of 1876*, § 3023.

<sup>b</sup>*Cal. Code Civ. Pro.*, § 612.

<sup>c</sup>*Colo. Code Civ. Pro.*, § 169.

<sup>d</sup>*Del. Rev. Code*, p. 649, § 26.

<sup>e</sup>*Ill. Rev. Stat.*, 1880, p. 793, §§ 55, 56.

<sup>f</sup>*Rev. Code, Iowa*, 1880, § 2797.

<sup>g</sup>*Comp. Laws, Nev.*, 1873, § 1230.

<sup>h</sup>*N. J. Rev.*, 1877, p. 876, § 182.

<sup>i</sup>*Gen. Laws, Oreg.*, 1872, p. 146, § 202.

<sup>j</sup>*Gen. Stat., Minn.*, 1883 (*Young's 4th ed.*), p. 743, § 231.

<sup>k</sup>*Rev. Stat., Tex.*, 1879, art. 1303.

<sup>2</sup>*Depositions* are commonly excepted from the general rule, see note 1, *above*. The reason is that the testimony which they contain, if read and re read by the jury, would otherwise have an unfair advantage over the oral testimony, by speaking to the jury more than once. But where all the evidence is in writing, this is no objection.

*Thomp. & M. on Juries*, § 385 (1, 2), and *cas. cit.*  
*Shomo vs. Zeigler*, 10 *Phila. (Pa.)*, 611.

In malicious prosecution, the affidavit of the defendant made before the magistrate in instituting the prosecution is not a deposition within the exception.

*Seibert vs. Price*, 5 *Watts & S.*, 438; s. c., 40 *Am. Dec.*, 525.

In New York and, *it seems*, in Ohio, it is within the discretion of the Court to permit the jury to take out a deposition even where the testimony is partly oral.

*Howland vs. Willetts*, 9 *N. Y.*, 170, 175.

*Stiles vs. McKibben*, 2 *Ohio St.*, 588.

<sup>3</sup>*Howland vs. Willetts*, 9 *N. Y.*, 170.

*Thomp. & M. on Juries*, § 383 (1), and *cas. cit.*

[*Contra*, in *Indiana*.

Nichols *vs.* State, 65 *Ind.*, 512, 521.

Lotz *vs.* Briggs, 50 *id.*, 346.

Toohy *vs.* Sarbis, 78 *id.*, 474].

Where the genuineness of a document in evidence is disputed it has been held error to allow it to be taken out by the jury to compare the *handwriting* of the body of it with that of the signature.

Matter of Foster, 34 *Mich.*, 21.

Chance *vs.* Indianapolis, etc., R. R. Co., 32 *Ind.*, 472.

Compare, however, State *vs.* Scott, 45 *Mo.*, 302, *contra*.

Papers admitted in evidence for other purposes may be taken to the jury room, it seems, to test handwriting by comparison.

Hardy *vs.* Norton, 66 *Barb.*, 527.

But see Howell *vs.* Hartford Fire Ins. Co. 6 *Biss.*, 163, where reasons are given why the comparison should be made only in open Court, and holding that it is no ground for a new trial to refuse to permit the jury to take out papers for that purpose. In Means *vs.* Means, 7 *Rich. L.*, (*So. Car.*), 533, it is held to be a matter within the discretion of the Court.

A document used for comparison by consent was held not a paper "read in evidence" within the meaning of a statute of Illinois allowing such papers to go to the jury-room, in

Cox *vs.* Straisser, 62 *Ill.*, 383.

As *judicial records* put in evidence must be complete, and as documents offered in evidence must generally go in as a whole, they may be taken to the jury-room, although they contain irrelevant matter, or even contain depositions pertinent to the proceeding wherein taken, but immaterial to the issue on which the jury are to find.

Shomo *vs.* Zeigler, 10 *Phila. (Pa.)*, 611.

In O'Neill *vs.* Calhoun, 67 *Ill.*, 219, where the record of a former suit was read in evidence by consent, it was held no error to allow it to be taken out by the jury, since it was not a deposition read without consent, nor was it excluded by the Ill. statute.

In Lotz *vs.* Briggs, 50 *Ind.*, 346, 348, it was held error to allow a record of a former suit, admitted in evidence, to be taken out by the jury. Thus applying the rule in that State which excludes all documents from the jury-room (see *above*).

<sup>4</sup> *Thomp. & M. on Juries*, § 383 (5).

Watson *vs.* Walker, 23 *N. H.*, 472, 497.



2. — *used, but not in evidence.*—The judge may also allow documents forming part of the record, or properly used before the jury on the trial,—such as the writ or process and the pleadings,<sup>1</sup> and bills of particulars,<sup>2</sup> and the judge's written instructions,<sup>3</sup>—to be taken out, provided the jury understand that they are not evidence.<sup>4</sup>

Other papers must not be taken out.<sup>5</sup>

<sup>1</sup> *Thomp. & M. on Juries*, § 387, and cases cited.

<sup>2</sup> *Rich vs. Flanders*, 39 *N. H.*, 304.

<sup>3</sup> *Thomp. & M. on Juries*, § 388, citing,—  
*Hurley vs. State*, 29 *Ark.*, 17, 29.  
*State vs. Tompkins*, 71 *Mo.*, 613.  
*Wood vs. Aldrich*, 25 *Wisc.*, 695.

In *Alabama*, a statute providing that written instructions shall "become part of the record and may be taken" out by the jury, is held to be mandatory, and that it is error to refuse to allow the jury to take them to the jury-room when requested by counsel.

*Miller vs. Hampton*, 37 *Ala.*, 342; *Ala. Sel. Cas.* 357.

In *Georgia*, however, it is regarded as an unsafe practice because of the danger of a part and not the whole being read by the jury, and it is held error for the judge to permit the jury to take his written charge to the jury-room against the objection of counsel.

*Gholston vs. Gholston*, 31 *Geo.*, 625.

Written instructions given to the jury at the trial cannot be sent to the jury after they have retired, without consent of the parties.

*Smith vs. McMillen*, 19 *Ind.*, 391.

<sup>4</sup> *Thomp. & M. on Juries*, § 386 (2),  
*O'Hara vs. Richardson*, 46 *Penn. St.*, 385, 389.

<sup>5</sup> *Thomp. & M. on Juries*, § 386 (1), and cas. cit.  
*Carlin vs. Chicago*, etc., *R. R. Co.*, 31 *Iowa*, 370 (an erroneous instruction taken out).  
*Durfee vs. Eveland*, 8 *Barb.*, 46 (counsel's minutes of testimony).  
*Mitchell vs. Carter*, 14 *Hun*, 448 (judge's minutes of testimony).  
*O'Brien vs. Merchants' Fire Ins. Co.*, 38 *N. Y. Super. Ct. (J. & S.)*, 482 (a prejudicial paper inadvertently left in an account book taken out. Judgment reversed).

*Nolan vs. Vosburg*, 3 *Ill. App.*, 596.

In an action to recover the balance struck on an *account rendered*, it was held error to allow the jury to take out the account itself, which was incompetent evidence and contested.

Watson *vs.* Davis, 7 Jones (N. C.) L., 178.

As to *computations* to aid the jury in estimating the amount due the plaintiff, the cases are conflicting. In *Michigan* it is the practice to allow the jury to take such a computation, made by the plaintiff's attorney, to the jury-room, provided they understand that it is not evidence.

Millar *vs.* Cuddy, 43 Mich., 273.

But the practice was disapproved of in *Hatfield vs. Cheaney*, 76 Ill., 488, where a witness made a computation of the amount due upon a note and made a memorandum of the result upon the note itself, to go to the jury. The practice is also disapproved of in *Alexander vs. Dunn*, 5 Ind., 122.

And in *Burton vs. Wilkes*, 66 N. C., 604, it was held error for a judge to hand to the jury an abbreviated estimate of plaintiff's claim for damages, against the wish of the opposite party.

See also *Drew vs. Andrews*, 8 Hun, 23, where it was held error for the Court to direct the jury to take out the pleadings and from them fix the amount due the plaintiff after having already found for the plaintiff without fixing any amount.

*Law books* should not be taken out by the jury.

Harrison *vs.* Hance, 37 Mo., 185.

Merrill *vs.* Nary, 10 Allen, 416 (a well considered case).

State *vs.* Smith, 6 R. I., 33.

Newkirk *vs.* State, 27 Ind., 1.

State *vs.* Kimball, 50 Me., 409, 418 (where it was held no error to refuse to allow the jury to take out the Revised Statutes).

[*Contra*, Loew *vs.* State, 60 Wisc., 559, s. c., 19 Northw. Rep., 695.]

Even where both parties consent.

Burrows *vs.* Unwin, 3 Car. & P., 310.

Nor *scientific books*, nor maps.

Thomp. & M. on Juries, § 392; citing *State vs. Gillick*, 10 Iowa, 98, and *State vs. Hartman*, 46 Wisc., 248.

See also *State vs. Lautz*, 23 Kans., 728.

But it is not error for a jury to use a dictionary to ascertain the meaning of a word employed by them in a special verdict.

Wright *vs.* Clark, 50 *Vt.*, 130 ; s. c., 28 *Am. R.*, 496.

And in United States *vs* Horn, 5 *Blatchf.*, 105, the use of city directories by the jury in their room was held insufficient ground for a new trial.

As the *judge's minutes* of the testimony are usually imperfect and are likely to have marginal notes, underscorings and comments written upon them, it is obvious that they should never go to the jury, and if the jury obtain them even accidentally, it is ground for a new trial.

Neil *vs.* Abel, 24 *Wend.*, 185.

Mitchell *vs.* Carter, 14 *Hun*, 448.

It is also erroneous for the *minutes of counsel* to go to the jury, and a new trial will be granted unless it affirmatively appears that the losing party could not have been prejudiced thereby.

Durfee *vs.* Eveland, 8 *Barb.*, 46.

As to *juror's minutes* of the testimony, it is provided by statute in some states (see note 1 under § 1 above), that they may be taken to the jury room ; but in the absence of a statute, it has been held in Indiana that, as jurors would be too apt to rely on what might be imperfectly written and thus make the case turn on a part of the facts, it is error to allow such minutes to be taken out.

Cheek *vs.* State, 35 *Ind.*, 492, 495.

3. *Several documents.*—If there are several documents and counsel do not agree on which shall be sent out, it is proper practice on sending any one or more out, to send all that have been put in evidence relating to the same subject.

## XIX. — FURTHER INSTRUCTIONS AND EVIDENCE.

Power and duty of giving  
further instructions.

Manner of giving.

3. Further evidence.

4. Inducing agreement.

1. *Power and duty of giving further instructions.*—After the jury have retired to deliberate upon their verdict, the judge of his own motion has power to recall them, and in the presence of the parties or their counsel give them further instructions,<sup>1</sup> or withdraw erroneous instructions; but this is in the discretion of the Court, and not the legal right of a party.<sup>2</sup>

When the jury makes a reasonable request for further instructions and either party joins in such request, it may be error to refuse.<sup>3</sup> But after the jury have retired, the judge is not bound to comply with a party's request to give additional instructions upon a point not covered by request of the jury;<sup>4</sup> nor to comply with a party's request to give the jury further instructions by way of explanation or modification of those already given;<sup>5</sup> for it is a matter within the discretion of the Court.

A fresh discussion by counsel of the law or the evidence, in the presence of the jury, cannot be had unless allowed by the judge in his discretion.<sup>6</sup>

When further instructions are given, they are subject to exceptions for error, the same as those given before the jury retired.<sup>7</sup>

<sup>12</sup> *Grah. & W. on N. Tr.*, 356 (a).

*Thomp. & M. on Juries*, § 355, and *cas. cit.*

*Commonwealth vs. Snelling*, 15 *Pick. (Mass.)*, 321, 333.

See *Hogg vs. State*, 7 *Ind.*, 551 (where it was held no error to give further instructions even against the wishes of counsel for both sides).

<sup>2</sup>Turner *vs.* Foxall, 2 *Cranch C. Ct.*, 324.

Forrest *vs.* Hanson, 1 *id.*, 63.

United States *vs.* White, 5 *id.*, 116.

See Tinkham *vs.* Thomas, 34 *N. Y. Super. Ct. (J. & S.)*, 236, where it was held no error for the judge to refuse to receive or entertain proposed requests to charge the jury after they had just been charged, and some of them had left the jury box on their way to the jury-room, although all of them were still in the court-room.

<sup>3</sup>See Drew *vs.* Andrews, 8 *Hun*, 23, where the jury having retired, and having sent in to request the Court to give them information as to what a witness had testified to upon a certain point, and the counsel for the losing party having, in the presence of the opposite counsel, asked the Court to bring in the jury and state the evidence to them as requested,—the refusal of this reasonable request was one of the grounds upon which a new trial was granted.

In Cook *vs.* Green, 1 *Hals. (N. J.)*, 109, the Court says: "If a jury, after withdrawing to consider the cause, get embarrassed on a question of law, they may, and, in prudence ought to, ask for the opinion of the justice thereon, and it is his duty to declare the law to them."

See also Yeldell *vs.* Shinholster, 15 *Geo.*, 189.

Compare Swaggerty *vs.* Caton, 1 *Heisk.*, 199, where, in a criminal case, the jury reported to the judge in open Court that they could not agree, but did not ask for further instructions, and it was held error for the judge to repeat to them certain disjointed portions of the charge already given, since it would lead the jury to suppose that such portions of the charge were the controlling features of the case.

<sup>4</sup>Kellogg *vs.* French, 15 *Gray*, 354.

<sup>5</sup>Nelson *vs.* Dodge, 116 *Mass.*, 367.

<sup>6</sup>Nelson *vs.* Dodge (*above*).

See Ruffing *vs.* Tilton, 12 *Ind.*, 259, where it is held no error to permit counsel to discuss to the Court what the form of the verdict shall be, in the presence of the jury, they having come in for instructions thereupon.

In Cotten *vs.* Rutledge, 33 *Ala.*, 110, it is held that, where both parties have waived their right to argue by declining so to do, allowing one party to reread a record to the jury on their coming for instructions, does not revive the right of the other to argue the case.

<sup>7</sup>Nelson *vs.* Dodge, 116 *Mass.*, 367.

2. *Manner of giving.*—Further instructions as to the se, after the jury have retired, should be given only in open Court, and when counsel on both sides are present have had notice and an opportunity of being present. This is matter of legal right. If either party requests at a further instruction be given, or if the jury send in an inquiry, it is proper practice to submit the answer, in writing, to counsel, and if they consent, to send it to the jury; if counsel do not consent, then to call in the jury and answer their inquiry in open court.

*Thomp. & M. on Juries*, § 355.

*Rogers vs. Moulthrop*, 13 *Wend.*, 274.

*Watertown Bk. vs. Mix*, 51 *N. Y.*, 558.

*Cook vs. Green*, 1 *Hals. (N. J.)*, 109.

*Campbell vs. Beckett*, 8 *Ohio St.*, 210.

In *Cook vs. Green* (*above*), the Court says that if counsel "sought for honestly at the *place of trial*, where they ought to be, cannot be found, or being found, they or either of them refuse to attend, such absence or refusal does not release the justice from his duty to declare the law to the jury."

See also *Preston vs. Bowers*, 13 *Ohio St.*, 1, where it is held no error for the Court to give further instructions to the jury during its regular session in open Court in the absence of a party or his counsel after the parties and their counsel have been loudly called at the door.

And in *Chapman vs. Chicago & N. W. R. R. Co.*, 26 *Wisc.*, 295; s. c., 7 *Am. R.*, 81, where further instructions were given to the jury at their request *in open Court*, but in the absence of one of the parties and his counsel, to whom no notice was given, it was held not to be a private communication, and that the failure of the Court to give the customary notice was no error, and that the giving of notice to counsel in such a case is a matter of grace or favor on the part of the Court, and not of legal obligation; but that it is the legal obligation and "duty of counsel and suitors to be present in Court when their causes are moved or any proceedings taken in them; and if they are not, it is at their own risk, and not at the risk of the other party, if the Court sees fit not to notify them." But it is to be observed that the Court speak of the fact that the absent party and his counsel were well aware of the hour

in the evening to which the Court had adjourned for the express purpose of reviewing the verdict, if any and discharging the jury; and also that the Court expressly approve of the custom of giving notice to absent counsel, and makes the significant remark that "the Court may proceed without it [notice] subject to the power of opening the proceedings where sufficient cause of absence is shown, and it appears that injustice has been done." The Court distinguished the cases of *Redman vs. Gulnac*, 5 *Cal.*, 148, and *Campbell vs. Beckett*, 8 *Ohio St.*, 210 (*above*), from the one at bar, on the ground that the former was a decision under a statute of California positively prohibiting further instructions in the absence of counsel, and that the latter was a case where, unlike the one at bar, the further instructions were given *during a recess* of the Court, and in the absence of both parties and their counsel.

In *Campbell vs. Beckett* (*above*) the Court quotes, with apparent approval, the passage given above from *Cook vs. Green*, but adds that in the case under consideration the instructions were given without notice to the absent counsel, and "during the hours of recess of the Court when it was neither the duty nor custom of parties or their counsel to be in the court-room." It may be added that this Ohio case was decided under a provision of the Code in that state requiring further instructions to the jury to be given in open Court "in the presence of, or after notice to the parties or their counsel;" and the Court was of the opinion that the provision was intended to express, and did in fact correctly express the common law rule upon the subject.

In *Taylor vs. Manley*, 14 *Miss.* (6 *S. & M.*), 305, judgment was reversed for error in giving instructions to the jury in absence of the parties and without their consent during a recess of the Court, even though the jury had returned and asked for an explanation of a matter of law, for it contravened a Mississippi statute requiring instructions to be given at the request of a party.

As an *exception* to the rule that further instructions must be given in open Court in the presence of counsel, it seems that the judge may go alone to the jurors' room to give them further instructions at their request (*Taylor vs. Betsford*, 13 *Johns.*, 487; *Moody vs. Pomeroy*, 4 *Denio*, 115); or may send them written instructions at their request (*Plunkett vs. Appleton*, 9 *N. Y. Super. Ct.* (*J. & S.*), 159; provided that in each case the parties give their *express* consent, which it seems must be affirmatively proved and cannot be inferred from counsel's fail-

ure to object when knowing that the judge is going to do either one of those things (same cases). In *Whitney vs. Crim*, 1 *Hill*, 61, the complaining party had told the judge that the jury wished to see him, and it was held to be equivalent to an express consent that the justice should go into the jury-room.

So, too, it seems no ground for a new trial that the jury are given further instructions in their own room provided the parties or their counsel are present, or have notice and an opportunity of being present.

*Rogers vs. Moulthrop*, 13 *Wend.*, 274.

*Cook vs. Green*, 1 *Hals. (N. J.)*, 109.

The cases in New Hampshire also form an exception to the rule, and it is settled in that state that upon the request of the jury after they have retired, and after the Court has adjourned, the judge may send them further instructions in writing as to a *matter of law*, even though counsel are not present; (*School District vs. Bragdon*, 3 *Fest. [N. H.]*, 507, 517, which states that the broad rule of *Sargent vs. Roberts*, 1 *Pick. [Mass.]*, 342, is not recognized in New Hampshire); but cannot send them further instructions as to a *matter of fact* (*Sharpley vs. White*, 6 *N. H.*, 172, 176); since any error in stating the evidence to the jury could not be corrected, as a matter of law may, upon exceptions to the written instructions, which should be returned by the jury with the other papers in the case when they come into Court.

So, too, in South Carolina, what communication may be made by the Court to the jury after they have retired is left entirely to the discretion of the judge (*Goldsmith vs. Solomons*, 2 *Strobb. L.*, 296, 300, which disapproves of *Sargent vs. Roberts*, 1 *Pick. Mass.*, 342).

In Virginia, also, it would seem to be left to the discretion of the judge as to what communications he shall make to the jury during their deliberations (see *Phillips vs. Commonwealth*, 19 *Gratt.*, 485, 533, where it was held not a ground for a new trial that the judge visited the jury in their room and inquired after their health and took personal custody of a juror separated from his fellows for a short time; and the Court was also of the opinion that it is "in the competency of a judge out of Court, as necessity or occasion may require, to direct, superintend and charge jurymen and other officers of the Court in matters pertaining to their official conduct and behavior out of court").

In the United States Circuit Court, sitting in Rhode Island, the practice is that if the jury send a written request



for instructions from the Court when not in session, the Court, after summoning the counsel and making known to them the inquiry of the jury, will then answer in writing if the Court think it safe and proper to do so.  
*Norris vs. Cook*, 1 *Curt. C. Ct.*, 464.

3. *Further evidence*.—The judge has power in his discretion to recall a witness that he may repeat testimony as to which the jury are in doubt,<sup>1</sup> or to allow new evidence to be taken on a question of fact on which they are in doubt.<sup>2</sup>

<sup>1</sup>*Blackley vs. Sheldon*, 7 *Johns.*, 32.

*Warner vs. N. Y. Central R. R. Co.*, 52 *N. Y.* 437, 441; s. c., 11 *Am. R.*, 724 (*Per FOLGER, J.*).

*Virginia vs. Zimmerman* 1 *Cranch. C. Ct.*, 47.

<sup>2</sup>*Commonwealth vs. Ricketson*, 5 *Met. (Mass.)*, 412 (*dictum*, sanctioning course of judge in allowing a witness to be called to testify on a point as to which the jury inquired).

*Henlow vs. Leonard*, 7 *Johns.*, 200.

4. *Inducing agreement*.—The judge must not coerce the jury into agreeing upon a verdict by intimidation or threats to subject them to any unreasonable inconvenience,<sup>1</sup> yet he may, and ought to urge upon the jury, all proper motives to induce them to agree upon a verdict, such as the propriety of a spirit of liberal concession in their deliberations, and the importance to the parties and the public of a verdict, and the saving of time and expense of a new trial.<sup>2</sup>

<sup>1</sup>*Spearman vs. Wilson*, 44 *Geo.*, 473.

*Pierce vs. Pierce*, 38 *Mich.*, 412.

*Green vs. Telfair*, 11 *How. Pr.*, 260.

*Slater vs. Mead*, 53 *id.*, 57.

Compare *Erwin vs. Hamilton*, 50 *id.*, 32.

<sup>2</sup>*Green vs. Telfair*, 11 *How. Pr.*, 260.

*Allen vs. Woodson*, 50 *Geo.*, 53.

s. p., *Pierce vs. Rehfuß*, 35 *Mich.*, 53.

But instructing them that they must compromise on amount, *held error*.

*Edens vs. Hannibal & St. J. R. R. Co.*, 72 *Mo.*, 213.

In order that a verdict may result from a further deliberation of the jury after proper admonitions as to their duty to try to agree, it is well settled that it is entirely within the sound discretion of the judge as to how long to keep them together, and it is no error or irregularity for him to refuse to discharge them until he is satisfied that there is no reasonable prospect of an agreement.

*White vs. Calder*, 35 *N. Y.*, 183; *s. c.*, 33 *How. Pr.*, 392.

*Erwin vs. Hamilton*, 50 *How. Pr.*, 32.

*Coit vs. Waples*, 1 *Minn.*, 134.

See *People vs. Green*, 13 *Wend.*, 55, where the jury were discharged after they had deliberated only thirty minutes, and, although a criminal case, the rule seems to apply with even greater force in civil cases.

When satisfied there is no reasonable prospect of an agreement, it is his duty to discharge them.

*People vs. Green*, 13 *Wend.*, 55, 58.

*Green vs. Telfair*, 11 *How. Pr.*, 260, 262.

But the judge cannot make an agreement of the jury a condition of their discharge.

*Slater vs. Mead*, 53 *How. Pr.*, 57.

And it seems he should not intimate to them how long he intends to keep them together.

*Green vs. Telfair*, 11 *How. Pr.*, 260, 262.

*Regina vs. Charlesworth*, 1 *B. & S.*, 523, where CROMPTON, J., says: "It is a dangerous thing to say that the jury should be discharged in a certain time, or in a few hours. I think that they should be kept, not to coerce them, but for such a time as that they should not be able to say, 'We need not agree in a verdict; we will wait for such a time and then we shall be discharged.'"

Compare *Erwin vs. Hamilton*, 50 *How. Pr.*, 32, 35.

In some States the matter is regulated by statute; as in New York, where, following the common law rule, the Code of Civil Procedure, § 1181, provides that the jury may be discharged, in case of disagreement, after being kept together for such a time as is deemed reasonable by the Court.

*N. Y. Code Civ. Pro.*, §§ 1181, 3347.

## XX.—RECEIVING VERDICT.

- |  |   |
|--|---|
| 1. Presence of parties.                        | 10. Power of the Court to require jury to correct.                    |
| 2. Place.                                      | 11. Power of the Court to correct the verdict.                        |
| 3. Time,—Sunday.                               | 12. Special questions.  |
| 4. Definiteness.                               | 13. Insisting on answers to special questions.                        |
| 5. Sealed verdict.                             | 14. — on definite answer.   |
| 6. Polling the jury.                           | 15. — failure to agree.   |
| 7. — the question.                             | 16. Insisting on general verdict when special questions are answered. |
| 8. — the right and consequence of dissent.     | 17. — argument ; exception.   |
| 9. Power of the jury to correct their verdict. |   |

1. *Presence of parties.*—The judge ought not, without necessity, to receive a verdict unless the parties are present or represented, or have had fair notice and opportunity to be present if within reasonable call. But in the absence of an adjournment to a fixed hour it is their duty to be within call.

Counsel cannot rely on having a new trial because of the inadequacy or omission of notice to them that the jury have come in.

At common law a verdict could not be received by the Court in the absence, or even without the consent of the plaintiff or his counsel, for his non-consent was a voluntary nonsuit.

*People vs. Mayor's Court of Albany*, 1 *Wend.*, 36.  
See also Division XIV. of this Brief, on "*Stopping the case.*"

Under the new procedure, a cause cannot be thus stopped at this point. Counsel for each party must hold himself in readiness to attend without notice, if there is no fixed adjournment or understanding that notice is to be given.

The mere fact that a verdict was received in the absence of *defendant* and his counsel when neither had opportunity to be present, or,—in jurisdictions where, after giving the case to the jury, there is no voluntary nonsuit,—it was received in the absence of *plaintiff* and his counsel when neither had opportunity to be present,—

is not alone error, without some other informality, or some resulting prejudice to the party.

*Perry vs. Mulligan*, 58 *Geo.*, 479 (defendant absent).

*Stiles vs. Ford*, 2 *Col. T.*, 128 (plaintiff absent: a well considered case).

*Merwin vs. Wheeler*, 41 *Conn.*, 14, 26 (plaintiff absent).

It is not necessarily a matter of right for the prisoner to have his counsel present on the reception of the verdict.

*Sutcliffe vs. State*, 18 *Ohio*, 469.

“It was their business to be in Court when the judge was in Court. \* \* \* Counsel must see to it that they are near when the judge moves, and be ready to move with him.”

*Perry vs. Mulligan*, 58 *Geo.*, 479.

2. *Place.*—The Court may, when necessary on account of illness of a juror, adjourn to where he is to receive the verdict.

In *King vs. Faber*, 51 *Penn. St.*, 387, where a juror was taken ill after the verdict was sealed, it was held no error for the Court to adjourn to his house and there have the verdict rendered in the presence of Court officers and all parties in the same manner as if in Court, the verdict being afterwards publicly announced by the clerk in the Court-room.

3. *Time.*—*Sunday.*—Court may be opened on Sunday to receive a verdict in a cause submitted to the jury on a previous day; and then may be adjourned over.

*Reid vs. The State*, 53 *Ala.*, 402; s. c., 25 *Am. R.*, 627, and *cas. cit.*

The statutory prohibition against opening Court or transacting business therein on Sunday, except receiving a verdict or discharging a jury (2 *N. Y. R. S.*, 275, § 7, same stat. revised in *Code Civ. Pro.*, § 6), impliedly allows the Court on committing a cause to the jury on a Saturday to adjourn till Sunday.

Such prohibition does not preclude the giving of further instructions on Sunday when a jury on that day report their disagreement.

*Jones vs. Johnson*, 61 *Ind.*, 257.

Or if it does, the prohibition may be to that extent waived by neither party objecting.  
*Roberts vs. Bower*, 5 *Hun*, 558.

4. *Definiteness*.—If a verdict, special verdict, or finding, is not definite or certain, either party may require it to be made so before the jury are discharged.

*Kansas Pacific R. R. Co. vs. Pointer*, 14 *Kans.*, 37.  
*s. p.*, *Bruck vs. Mansbury*, 102 *Penn. St.*, 35.

5. *Sealed verdict*.—The jury must all be present in open Court,<sup>1</sup> at the opening of a sealed verdict.<sup>2</sup> But this may be expressly waived.<sup>3</sup>

<sup>1</sup>The consent of parties held not sufficient to sanction the clerk in presiding in the absence of the judge.  
*Willet vs. Porter*, 42 *Ind.*, 250.

Act of judge in receiving verdict in absence of parties and clerk, held to make it a privy verdict, and of no effect, although read in Court next morning.  
*Young vs. Seymour*, 4 *Nebr.*, 86.

<sup>2</sup>*Norvell vs. Deval*, 50 *Mo.*, 272; *s. c.*, 11 *Am. R.*, 413 (juror taken insane after verdict sealed, and before opening).

*Crotty vs. Wyatt*, 3 *Ill. App.*, 388 (party deprived of right to poll).

*King vs. Faber*, 51 *Penn. St.*, 387 (Court adjourned to house of sick juror in order to secure presence; held no error).

*Sargent vs. State of Ohio*, 11 *Ohio*, 472, (*dictum* in criminal case).

*Tifield vs. Adams*, 3 *Iowa*, 487 (presence presumed if record does not show the contrary).

*Bass vs. Hanson*, 9 *id.*, 563 (accidental unsealing in the hands of foreman disregarded).

Omission to ask jurors whether they agreed to the verdict, held no error where objection was not made at the time.  
*Paige vs. O'Neal*, 12 *Cal.*, 483.

<sup>3</sup>*Woods vs. Commissioners of Van Buren Co.*, 1 *Morr.* (*Iowa*), 441.

Presence of the jury was held expressly waived where the parties had stipulated that the jury might deliver it "to the officer in charge, and *disperse*:" this being a waiver of the right to poll.

*Koon vs. Phoenix Mut. Life Ins. Co.*, 104 *U. S.* (14 *Otto*), 106.

So also of an agreement that they “*need not return.*”

*Pierce vs. Hasbrouck*, 49 *Ill.*, 23.

s. p., *Burlingame vs. Burlingame*, 18 *Wisc.*, 285.

Otherwise of a mere agreement that they might render a sealed verdict.

*Steele vs. Etheridge*, 15 *Minn.*, 503.

*Root vs. Sherwood*, 6 *Johns.*, 68.

*Fox vs. Smith*, 3 *Cow.*, 23.

An order to seal and *deliver to the Clerk*, made under agreement of parties, *held* to dispense with return of the jury, and to preclude their amending the verdict afterward.

*Trout vs. West*, 29 *Ind.*, 51.

6. *Polling the jury.*—Either party has an absolute right to have the jury polled on the rendering of their verdict, whether sealed or oral, at any time before it is recorded, unless the right has been expressly waived.<sup>1</sup>

This rule does not apply to a verdict fixed by the direction of the Court.<sup>2</sup>

<sup>1</sup>*Labor vs. Koplin*, 4 *N. Y.*, 547.

*Warner vs. N. Y. Central R. R. Co.*, 52 *N. Y.*, 437; s. c., 11 *Am. R.*, 724, and cases cited (sealed verdict).

*James vs. State*, 55 *Miss.*, 57 (sealed verdict).

*Steele vs. Etheridge*, 15 *Minn.*, 503 (*dictum* that the right to poll the jury is not affected by an agreement that the jury may seal their verdict, but see note on p. of this Brief for rule in case of agreement that they may seal *and disperse*).

*Martin vs. Morelock*, 32 *Ill.*, 485, 487.

*Crotty vs. Wyatt*, 3 *Ill. App.*, 388.

[*Contra.* In *Massachusetts* and *Connecticut*, however, it is not a matter of right to have the jury polled, the opportunity afforded for open dissent on the part of a juror being deemed sufficient.]

*Commonwealth vs. Costley*, 118 *Mass.*, 1.

*State vs. Hoyt*, 47 *Conn.*, 533, 534.

In *Texas* and *Florida*, in the case of a sealed verdict brought in by consent, it is held that it is not a matter of right to have the jury polled, except in *Texas*, to ascertain whether they agreed when the verdict was sealed.

*Hancock vs. Winans*, 20 *Texas*, 320.

*Whitner vs. Hamlin*, 12 *Fla.*, 18 (holding it discretionary)].

After the verdict has been received and recorded it is too late to make a request to poll the jury.

*High vs. Johnson*, 28 *Wisc.*, 72 (no error to refuse such request).

But the mere entry of the verdict in the clerk's rough minutes does not necessarily constitute a recording within the rule, until after the jury are discharged.

*Warner vs. N. Y. Central R. R. Co.*, 52 *N. Y.*, 437; s. c., 11 *Am. R.*, 724 (where the jury, not yet discharged, were held properly polled after the entry of a sealed verdict in the clerk's minutes).

Compare *Steele vs. Etheridge*, 15 *Minn.*, 503 (where it was held that a polling after recording was of no effect, even though it took place before the jury were discharged, and one of the jurors dissented. *Held* also that affidavits would not be received to prove that the polling really took place before the recording, when the record stated that the polling was after the verdict was recorded).

<sup>2</sup>*McLaren vs. Indianapolis & Vinc. R. R. Co.*, 83 *Ind.*, 319 (where, upon directing a verdict, it was held no error to refuse to allow the jury to be polled although the statute provided that "either party may poll the jury").

7. — *the question*.—The question put to each juror, on polling, must simply be, "Is this your verdict?"

*The reason* is that the object in polling is simply to ascertain if the verdict announced is that of the jurors.

*Labor vs. Koplin*, 4 *N. Y.*, 547 (error to allow the question, "Is this your verdict against each of defendants?").

*Leighton vs. People*, 10 *Abb. N. C.*, 261 (aff'd in 88 *N. Y.*, 117, but not discussing the point), where stating the proper question to be asked, it was held no error to decline to inform the jury that the answer given should be the conscientious individual opinion of each man.

*Bowen vs. Bowen*, 74 *Ind.*, 470 (where the question, "Is this your verdict, and are you still satisfied with it?" was held properly excluded).

8. — *the right and consequence of dissent*.—A juror has a right to dissent from the verdict, whether sealed or oral, at any time before it is recorded and before they have been discharged.

Upon such dissent they should be sent back for further deliberation.

*Bunn vs. Hoyt*, 3 *Johns.*, 255.

*Douglass vs. Tousey*, 2 *Wend.*, 352.

*Weeks vs. Hart*, 24 *Hun.*, 181.

*Warner vs. N. Y. Central R. R. Co.*, 52 *N. Y.*, 437 ;  
s. c., 11 *Am. R.*, 724 (sealed verdict).

But a juror who dissents from a sealed verdict he signed, may be punished for contempt in signing what was not his verdict, if the act be not excused. *VAN VORST, J.*, in an unreported case.

An evasive answer, such as "I consented to it," must be objected to at the time if at all.

*Green vs. Bliss*, 12 *How. Pr.*, 428.

Dissent and change induced from being told that the legal effect of their special findings would be contrary to the general verdict, *held* not to avail.

*Fitzpatrick vs. Himmelman*, 48 *Cal.*, 588.

9. *Power of the jury to correct their verdict.*—At any time before the verdict has been recorded and their relation to the case as jurors has ceased, the jury may alter their verdict either in form or substance, whether it be oral or sealed.

*Bishop vs. Mugler*, 33 *Kans.* ; abstr. s. c., 24 *Am. L. Reg.*, *N. S.*, 280.

*Herzberg vs. Murray*, 40 *Super. Ct. (J. & S.)*, 271.

*Warner vs. N. Y. Central R. R. Co.*, 52 *N. Y.*, 437 ;  
s. c., 11 *Am. R.*, 724 (sealed verdict).

*Beal vs. Cunningham*, 42 *Me.*, 362 (insertion of "not" before "guilty" allowed).

*Hamilton vs. Barton*, 20 *Iowa*, 505.

*Comer vs. Jackson*, 50 *Ala.*, 384.

*Watertown Ecc. Soc. Appeal*, 46 *Conn.*, 230.

*Art. in 20 Cent. L. J.*, 145, and cas. cit.

Filing a sealed verdict, not recording within this rule.

*Rees vs. Stille*, 38 *Penn. St.*, 138.

10. *Power of the Court to require jury to correct.*  
—Before a verdict, whether oral or sealed, is recorded, and the jury have been dismissed from their relation as



such to the case, the Court has power to require them to reconsider their verdict, not merely to correct a mistake in form or make that plain which was obscure, but to supply what is wanting, or alter it in substance, if they so agree.<sup>1</sup>

This rule applies whether they have announced agreement,<sup>2</sup> or dissent appears.<sup>3</sup>

<sup>1</sup>Warner *vs.* N. Y. Central R. R. Co., 52 *N. Y.*, 437; s. c., 11 *Am. R.*, 724.

Tyrrel *vs.* Lockhart, 3 *Blackf.*, 136.

Reitenbach *vs.* Luderick. 31 *Penn. St.*, 131 (sealed verdict).

Bolster *vs.* Cummings, 6 *Me.*, 85.

Sutliff *vs.* Gilbert, 8 *Ohio*, 405 (computation which verdict directed to be made).

Mason *vs.* Massa, 122 *Mass.*, 477 (arithmetical addition).

Brown *vs.* Dean, 123 *id.*, 254 (verdict nominal damages and that defendant lower his mill dam. Correction, substantial damages alone).

Maclin *vs.* Bloom, 54 *Miss.*, 365 (omission to state amount, supplied).

Rush *vs.* Pedigo, 63 *Ind.*, 479, 483 (omission to answer special questions, supplied).

Art. in 20 *Cent. L. J.*, 145, and cas. cit.

<sup>2</sup>Florence Sewing Machine Co. *vs.* Grover & Baker S. M. Co., 110 *Mass.*, 96.

<sup>3</sup>Root *vs.* Sherwood, 6 *Johns.*, 68.

Warner *vs.* N. Y. Central R. R. Co., 52 *N. Y.*, 437; s. c., 11 *Am. R.*, 724.

11. *Power of the Court to correct the verdict.*—The Court has power to correct an informality in the verdict, or to correct the entry thereof so as to make it conform to the real finding of the jury.<sup>1</sup> If a verdict disregards instructions properly given, the Court may, (if the case affords the means of so doing without a further finding upon a question which ought to be determined only by the jury,) correct the verdict in substance to conform to

uch instructions;<sup>2</sup> otherwise the Court cannot alter a verdict in substance.

- <sup>1</sup>*Dalrymple vs. Williams*, 63 *N. Y.*, 361; s. c., 20 *Am. R.*, 544 (finding against both when intended only against one; overruling in effect, *dictum* in *Warner vs. N. Y. Central R. R. Co.*, 52 *N. Y.*, 437; s. c., 11 *Am. R.*, 724.)  
*Chittenden vs. Evans*, 48 *Ill.*, 52.  
*Woodruff vs. Webb*, 32 *Ark.*, 612.  
*Lincoln vs. Iron Co.*, 103 *U. S.* (13 *Otto*), 412.  
*Matheson vs. Grant*, 2 *How. (U. S.)*, 263, 280 (correcting general verdict, so as to apply to single count).  
*O'Brien vs. Palmer*, 49 *Ill.*, 72 (rejecting surplusage).  
*High vs. Johnson*, 28 *Wisc.*, 72 (inserting nominal damages where no damages were found).  
*Chamberlain vs. Brady*, 49 *Super. Ct. (J. & S.)*, 484 (correcting error in adding).  
*West vs. Bank of Americus*, 63 *Geo.*, 230 (referring to pleadings to determine a great ambiguity in respect to amount, viz., meaning of "eighteen 1800 dollars").

If the verdict is inadequate in form the Court have power to interrogate the jury upon it and send them out for further deliberation necessary to put it in proper form.  
*Dorr vs. Fenno*, 12 *Pick.*, 521, 526.

- <sup>2</sup>*Schweitzer vs. Connor*, 57 *Wisc.* 177.

12. *Special questions.*—Where the jury finds a general verdict, the Court may instruct it to find also specially upon one or more questions of fact stated in writing.

*N. Y. Code Civ. Pro.*, § 1187, third clause.

It is within the discretion of the trial judge, to the exercise of which no exception lies, to put inquiries to the jury as to grounds upon which they found their verdict; their answers may be made part of the record, and will have the effect of special findings of the facts stated by them.

*Spurr vs. Shelburne* 131 *Mass.*, 429.

13. *Insisting on answers to special questions.*—Where the statute makes the putting of special questions

a matter of right, it is error for the Court, against the objection of a party at whose request proper special questions have been put, to receive a general verdict without requiring answers to such questions.

**Maxwell vs. Boyne**, 36 *Ind.*, 120.

s. p., **Crane vs. Reeder**, 25 *Mich.*, 303 (holding it error to instruct the jury that they need not answer such questions if in doubt; because, upon every material question one party or the other holds the affirmative, and if he fails to make out his case upon it by the evidence the finding should be against him upon it. **COOLEY**, J.).

Whether it is error to do so where the putting of such questions is discretionary is disputed.

*Affirmative—*

**Doom vs. Walker**, 15 *Nebr.*, 339; s. c., 18 *Northw. Rep.*, 138.

*Negative—*

**Moss vs. Priest**, 19 *Abb. Pr.*, N. S., 314, 317.

14. — *on definite answer.*—A statement of the opinion or impression of the jury is not enough as an answer to a special question. The finding should be positive.

**Hopkins vs. Stanley**, 43 *Ind.*, 553, 559, and *cas. cit.*

15. — *failure to agree.*—If the questions have not been withdrawn and the jury cannot agree on one which involves a fact essential to sustain their general verdict, the general verdict cannot avail.<sup>1</sup>

But the verdict is not vitiated by inability to agree on which of two alternatives they rely on, if each would alone support the verdict.<sup>2</sup>

<sup>1</sup>**Ebersole vs. Northern Central R. R. Co.**, 23 *Hun.*, 114, 118.

<sup>2</sup>**Murray vs. N. Y. Life Ins. Co.**, 96 *N. Y.*, 614.

See further, p. 189 of this Brief, paragraphs 4–6 of Division XXI.

16. *Insisting on general verdict when special questions are answered.*—Where special questions are answered the party has a right to have a general verdict entered, unless a proper special verdict is made.

*Hodges vs. Easton*, 106 *U. S.* (16 *Otto*), 408, 412.  
*s. p.*, *Carey vs. Dwyre*, 15 *Hun*, 153.

17. — *argument; exception.*—It is in the discretion of the judge whether to hear, in presence of the jury, argument of counsel on the question of correcting a verdict.<sup>1</sup>

An exception lies to error in directing a correction.<sup>2</sup>

<sup>1</sup>*Ruffing vs. Tilton*, 12 *Ind.*, 259.

<sup>2</sup>*Chittenden vs. Evans*, 48 *Ill.*, 52.

## XXI.—APPLICATIONS AFTER VERDICT.

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|--|--|
| 1. Discharge terminates power: correction.       | 8. Motion for nonsuit.                             |
| 2. Omission to record.                           | 9. Motion to set aside verdict taken subject, etc. |
| 3. Judgment for more than demanded in complaint. | 10. Further questions.                             |
| 4. Effect of special findings.                   | 11. Dismissing for want of jurisdiction.           |
| 5. — indirect finding.                           | 12. Certificate for costs.                         |
| 6. — failure or refusal to find.                 | 13. Certificates of probable or reasonable cause   |
| 7. Ordering exceptions to the General Term.      | 14. — application for.                             |
|  | 15. Additional allowance.                          |

1. *Discharge terminates power: correction.*—After the jury have been discharged and have separated, they cannot be recalled to act as a jury in respect to the verdict.<sup>1</sup>

But the Court have power, within a reasonable time, to amend a mistake in the verdict; and the judge's notes<sup>2</sup> or the jurors' testimony may be used to show what the

verdict really was for the purpose of correcting the minutes.<sup>3</sup>

<sup>1</sup>St. Clair *vs.* Caldwell, 72 *Ala.*, 527.

Trout *vs.* West, 29 *Ind.*, 51.

People *vs.* Reagle, 60 *Barb.*, 527, 546 (so held in criminal case even where discharge was illegal.)

Otherwise, where the Court had directed them to be discharged, and before the direction was recorded or they had separated they found they could agree.

Koontz *vs.* Hammond, 62 *Penn. St.*, 177.

<sup>2</sup>Matheson *vs.* Grant, 2 *How. (U. S.)*, 263, 281.

<sup>3</sup>Dalrymple *vs.* Williams, 63 *N. Y.*, 361.

Dayton *vs.* Church, 7 *Abb. N. C.*, 367.

s. p., Jones *vs.* Smith, 64 *Geo.*, 711.

Burlingame *vs.* Central R. R. Co., of Minn., 23 *Fec. Rep.*, 706 (where a jury was recalled two days after their verdicts were rendered and the verdict was corrected on their affidavits that interest was intended to be added).

[*Contra*, Walters *vs.* Junkins, 16 *S. & R.*, 414; s. c., 1 *Am. Dec.*, 585.

Reitenbaugh *vs.* Ludwick, 31 *Penn. St.*, 131 (*dictum*).]

2. *Omission to record*.—An omission to properly record the verdict is an irregularity only.

Gunn *vs.* Plant, 94 *U. S. (4 Otto)*, 304.

State *vs.* Levy, 24 *Minn.*, 362 (where entry of verdict after discharge of jury was held not to impair the verdict where before their discharge it was read to them and they were asked if it was their verdict and they assented to it,—even though statute substantially required the clerk to immediately record the verdict and then read it to the jury before their discharge).

As to what properly constitutes a recording, see

Warner *vs.* N. Y. Central R. R. Co., 52 *N. Y.*, 437 443; s. c., 11 *Am. R.*, 724 (per FOLGER, J.).

3. *Judgment for more than demanded in complaint*.—Where the amount of a verdict exceeds the sum demanded in the complaint, the Court has no power to

amend the complaint by increasing the demand to correspond with the amount of the verdict, unless plaintiff consents to a new trial and pays defendant's costs.<sup>1</sup> But the plaintiff may take judgment for the amount demanded in his complaint, remitting the excess.<sup>2</sup>

The objection that the amount of recovery exceeds demand, is waived unless taken before the entry of judgment.<sup>3</sup>

And an allegation of damages, as distinguished from a demand in the demand for relief, may, it seems, be amended after a verdict exceeding the amount of the allegation, but not exceeding the demand.<sup>4</sup>

<sup>1</sup> *Coming vs. Coming*, 6 *N. Y.*, 97.

*Decker vs. Parsons*, 11 *Hum.*, 295.

*Pharis vs. Gere*, 31 *id.*, 443.

Compare *Knapp vs. Roche*, 62 *N. Y.*, 614 (sanctioning amending at trial to conform complaint to proof).

<sup>2</sup> *Coming vs. Coming* (*above*).

<sup>3</sup> *Brown vs. Schoonmaker*, 10 *Reporter*, 745.

<sup>4</sup> *Schultz vs. Third Ave. R. R. Co.*, 89 *N. Y.*, 242, 247 (per EARL, J.).

Where a complaint has been improperly amended after verdict by increasing the demand, it seems that the irregularity in the verdict should be taken advantage of by motion and not by an exception.

*Diossy vs. Morgan*, 74 *N. Y.*, 11, 14.

4. *Effect of special findings.*—Answers to special questions submitted to the jury, if inconsistent with the general verdict, control the latter and the Court may give judgment accordingly,<sup>1</sup> and this is to be entered without setting aside the general verdict.<sup>2</sup>

A finding is not inconsistent with the general verdict within this rule, if any other hypothesis of fact capable of being supported by the evidence before the jury, might supply its place.<sup>3</sup>

<sup>1</sup> *Fraschieris vs. Henriques*, 6 *Abb. Pr.*, *N. S.*, 251, 263 (per BRADY, J.).

*Dempsey vs. Mayor, etc.*, *N. Y.*, 10 *Daly (N. Y.)*, 417, 418 (citing *Code Civ. Pro.*, § 1188).

*Nichols vs. Weaver*, 7 *Kans.*, 373 (citing *Kans. Gen. Stat.*, 684, § 287).

*Tobie vs. Brown Co.*, 20 *Kans.*, 14.

*Leese vs. Clark*, 20 *Cal.*, 387 (judgment reversed for error in refusing to enter judgment on special findings).

*McDermott vs. Higby*, 23 *Cal.*, 489.

*Baird vs. Chicago, R. I., etc., R. R. Co.*, 55 *Iowa* 121; s. c., 7 *Northw. Rep.*, 460.

*Ogg vs. Sheehan*, 22 *Northw. Rep.*, 557.

*Everett vs. Buchanan*, 2 *Dak.*, 249 (citing *Dak. Code Civ. Pro.*, § 261, but holding that the special findings were not inconsistent with the general verdict).

*Bremmerman vs. Jennings*, 61 *Ind.*, 334 (where upon a general verdict for a defendant, who had set up fraud and failure of consideration in an action on a promissory note, *held*, error to refuse to enter judgment for plaintiff upon the special findings that he bought the note for value before maturity and without notice).

*Nelson vs. Neely*, 63 *Ind.*, 194.

*Hogan vs. Chicago, M., etc., R. R., Co.*, 59 *Wisc.*, 139.

<sup>2</sup> *Dempsey vs. Mayor, etc., of N. Y.*, 10 *Daly*, 417.

<sup>3</sup> *Kellow vs. Central Iowa R. R. Co. (Iowa, 1885)*, 23 *Northw. Rep.*, 745.

5. — *indirect finding*.—A special finding, as to any fact necessary to be proved, to the effect that there is not sufficient evidence of it, is equivalent to a finding against it, and entitles the adverse party to judgment.

*M'Limans vs. City of Lancaster (Wisc., 1885)*, 23 *Northw. Rep.*, 694.

6. — *failure or refusal to find*.—If the jury fail to agree on an answer to a special question, this is equivalent to a finding inconsistent with the general verdict, provided the fact is indispensable to support such a verdict. Otherwise, if the verdict can be supported on any other hypothesis within the scope of the evidence before the jury.

s. p., *Kellow vs. Central Iowa R. R. Co. (Iowa, 1885)*, 23 *Northw. Rep.*, 745.

7. *Ordering exceptions to the General Term.*—A party who has taken an exception may move before the trial judge at any time during the same term, that the exceptions be heard on the first instance at General Term, and judgment be suspended in the meantime. It is in the discretion of the judge to grant or deny the motion.

*N. Y. Code Civ. Pro.*, § 1000.

If granted the proceeding at General Term is treated as a motion for a new trial, and may be brought on by either party. *Ib.*

This motion may be granted even though a motion on the minutes for a new trial is denied

*Garner vs. Mangam*, 46 *Super. Ct. (J. & S.)*, 365.

[*Contra*, *Byrnes vs. D. & H. C. Co.*, 7 *Weekly Dig.*, 549.]

This motion, however, cannot be availed of in a County Court, because it has no General Term, and the General Term of the Supreme Court has no jurisdiction of such a motion made in a County Court.

*Johnson vs. N. Y., Ontario, etc., R. R. Co.*, 30 *Hun*, 166.

This may be done in case of a nonsuit.

*Code Civ. Pro.*, § 1000, as am'd in 1882, superseding *Seely vs. N. Y. Central R. R. Co.*, 25 *Hun*, 280.

So under the corresponding section of the *Code of Procedure*, § 265, exceptions could be had at General Term in case of a nonsuit.

*Lake vs. Artisans' Bank*, 3 *Abb. Ct. App. Dec.*, 10; s. c., 3 *Abb. Pr., N. S.*, 209; 3 *Keyes*, 276, rev'g 17 *Abb. Pr.*, 232.

*Molony vs. Dows*, 9 *Abb. Pr.*, 86; s. c., 18 *How. Pr.*, 27.

*Brown vs. Conger*, 8 *Hun*, 625.

And plaintiff's exception to a nonsuit could be ordered to be heard at General Term.

*Mason vs. Breslin*, 9 *Abb. Pr., N. S.*, 427; s. c., 40 *How. Pr.*, 436; 2 *Sweeney*, 386.

In *Johnson vs. N. Y., Ontario, etc., R. R. Co.*, 30 *Hun*, 166, a case arising under *Code Civ. Pro.*, § 1000, it seems to be assumed that exceptions could be heard at General Term in case of a nonsuit, but the point was not raised or discussed, because the Court held that the General Term of the Supreme Court had no jurisdiction of exceptions taken in a County Court.



The order sending exceptions to the General Term does not of itself, it seems, suspend the entry of judgment and should therefore expressly provide for the suspension of judgment upon the verdict.

*Douglas vs. Haberstro*, 10 *Abb. N. C.*, 6; s. c., 61 *How. Pr.*, 29.

Only the exceptions are sent to the General Term. The evidence cannot be reviewed in order to set aside the verdict as excessive or against evidence.

*Post vs. Hathorn*, 54 *N. Y.*, 147, 151.

*Metropolitan Nat. Bank vs. Sirret*, 97 *N. Y.*, 320.

*Ross vs. Harden*, 42 *Super. Ct. (J. & S.)*, 427.

*Quinn vs. Carr*, 6 *Supm. Ct. (T. & C.)*, 402; mem. s. c., 4 *Hun*, 259.

*Hoxie vs. Greene*, 37 *How. Pr.*, 97.

*Amy vs. Stein*, 48 *Super. Ct. (J. & S.)*, 512.

But where there has been an exception taken to a refusal to direct a verdict in favor of a party against whom a verdict has been directed, the General Term may consider whether there was such an absence of evidence to support a material finding that the Court can determine as matter of law that the fact found was not proved.

*Metropolitan Nat. Bank vs. Sirret*, 97 *N. Y.*, 320, 325 (per ANDREWS, J.).

8. *Motion for nonsuit*.—A motion for a nonsuit cannot be made after verdict; but only renewed when it was previously made, and leave to renew was reserved.

*Downing vs. Mann*, 3 *E. D. Smith*, 36; s. c., 9 *How. Pr.*, 204.

*Hendrick vs. Stewart*, 1 *Overt. (Tenn.)*, 476.

And see *Onondaga County Mut. Ins. Co. vs. Minard*, 2 *N. Y.*, 98.

9. *Motion to set aside verdict taken subject, etc.*—Where a verdict is directed subject to the opinion of the Court, the trial judge may at the same term set it aside and direct judgment for either party.

*N. Y. Code Civ. Pro.*, § 1185.

In such case the other party can except, § 994, and have the judgment reviewed thereon by appeal.

10. *Further questions*.—After verdict in a cause tried by jury, it is irregular to proceed to determine further questions involved in the issues by the findings of the judge<sup>1</sup> or by a reference.<sup>2</sup>

<sup>1</sup>*Parker vs. Laney*, 58 *N. Y.*, 469; rev'g 1 *Supm. Ct. (T. & C.)*, 590.

<sup>2</sup>Paragraph 28 on p. 132 of this Brief.

11. *Dismissing for want of jurisdiction*.—Under the act of Congress of March 3, 1875,<sup>1</sup> a Circuit Court of the United States may even after verdict entertain a motion to dismiss for want of jurisdiction.<sup>2</sup>

<sup>1</sup>*Supplement U. S. R. S.*, p. 175, § 5.

<sup>2</sup>*Harlog vs. Memory*, 23 *Fed. Rep.*, 835.

12. *Certificate for costs*.—Where the title to real property comes in question or any fact appears whereby either party becomes entitled to costs or to increased costs as prescribed by law, the judge may, upon the application of the party to be benefited thereby, either before or after the verdict is rendered, make a certificate stating the fact.

Such a certificate is a proper mode of ascertaining the fact, though there be no statute authorizing it.

*Farrington vs. Rennie*, 2 *Cai.*, 220.

*Jackson vs. Randall*, 11 *Johns.*, 405.

By the *New York* Statute, the judge is required to make it *Code Civ. Pro.*, § 3248.

It relates only to facts appearing upon the trial.

*Wiley vs. Shaver*, 1 *Supm. Ct. (T. & C.)*, 324, 328.

*Baine vs. City of Rochester*, 85 *N. Y.*, 523 (*dicta*).

It is not needed in reference to an extrinsic fact, such as plaintiff's omission to present his claim against a municipal corporation to its chief fiscal officer before suing.

*Baine vs. City of Rochester*, 85 *N. Y.*, 523.

Where the statute expressly refers the question to the determination of the judge, a finding of the jury upon it is not necessarily conclusive upon him.

*Hunt vs. Leon*, 3 *Johns. Cas.*, 140.

So, by *Code Civ. Pro.*, § 3248, the certificate may be made *before*, or *after* verdict.

13. *Certificates of probable or reasonable cause.*—Circumstances which warrant suspicion<sup>1</sup> or reasonable doubt as to the construction of a statute<sup>2</sup> may be probable or reasonable cause under the United States Statutes respecting certificates.<sup>3</sup>

Reasonable cause and probable cause mean the same thing.<sup>4</sup>

<sup>1</sup>The *Gala Plaid*, 1 *Brown's Adm.*, 1 (probable cause for seizure).

s. P., *The Thompson*, 3 *Wall.*, 155.

*Locke vs. The U. S.*, 7 *Cranch*, 339.

<sup>2</sup>*U. S. vs. Riddle*, 5 *Cranch*, 311, 313.

<sup>3</sup>*U. S. R. S.*, §§ 970, 989.

<sup>4</sup>*U. S. vs. One Sorrel Horse*, 22 *Vt.*, 655, 657.

14. — *application for.*—An application for a certificate of probable cause is so far distinct from the trial that the Court have power to entertain it after the trial, and may hear evidence not taken at the trial.

The *Gala Plaid*, 1 *Brown's Adm.*, 1 (§ 970).

s. P., *U. S. vs. Abatoir Place*, 106 *U. S.* (16 *Otto*), 160.

15. *Additional allowance.*—Applications for an additional allowance can only be made to the Court before which the trial is had, or the judgment rendered, and must in all cases be made before final costs are adjusted.

*N. Y. Gen. Rule 44* (1884).

But in the N. Y. First Judicial District this rule does not authorize the application to be made out of that district, even before the same judge who tried the case.

*Hun vs. Salter*, 92 *N. Y.*, 651, citing *Code Civ. Pro.*, § 769, as controlling the rule.

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# A BRIEF

ON

## The Modes of Proving the Facts

MOST FREQUENTLY IN ISSUE

OR

COLLATERALLY IN QUESTION

ON

## The Trial of Civil or Criminal Cases.

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BY AUSTIN ABBOTT

Of the New York Bar.

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To get in our legal evidence and to keep out illegal evidence of the adversary, is the great art of trying causes; and the policy of counsel is to choose among various modes of proof, that evidence which is competent, either of right or in the discretion of the judge, prudent in the face of the adversary, and likely to be not only effective now, but safe in case of appeal.

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DIOSSY & CO.,

231 BROADWAY, NEW YORK.

1880.

# PREFACE.

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Every practitioner knows the aid afforded on a trial by the little brief of a few selected authorities he may have made in preparation for getting in his own evidence and keeping out that of his adversary.

A number of such briefs that have stood the test of experience I have here consolidated into one systematic whole, which I have enlarged so as to include all the topics most commonly contested, and have condensed by pruning away whatever was peculiar to a particular action, or not likely to be both useful and safe in general practice.

It is a familiar elementary principle that the rules of evidence are the same in Civil and Criminal cases, so far as concerns the *mode* of proof. It is when we come to the effect of evidence that the distinction appears. This work, therefore, is adapted to use both in civil and criminal cases. Those questions of evidence which are peculiar to criminal cases, such as the Testimony of the Accused and of Accomplices, Confessions, Consciousness of Guilt, and the like, I have treated in the Criminal Trial Brief; and none of that matter is repeated here, but only referred to in its appropriate place. So the rules which are peculiar to Civil Jury trials, such as the Pleadings Considered as Evidence, etc., are rarely repeated here.

I assume that the reader is familiar with the general principles of the Law of Evidence, and with the appropriate sphere of rules applicable to but a single class of cases; and that when he takes up this volume he is concerned with the rules either of admission or exclusion, which aid him in dealing with a particular fact or class of facts not peculiar to a particular action. In support of such rules, civil and criminal cases are alike instructive authority, and both are accordingly cited.

A word of explanation of the arrangement of the work and its relation to the two other Brief books may facilitate its use.

For convenience of ready reference the order of subjects is strictly alphabetical. It is an Alphabet of Evidence. But to find what he wishes the reader should not search for the general rules of evidence, such as Documentary Evidence, Hearsay, etc., but should ask himself what is the object of his proof; what fact does he wish to get in or keep out. For instance, if he wishes to know whether Hearsay and Opinion are competent for the purpose of proving the age or the health of a person, he should look not for Opinion or Hearsay, but for Age or Health. The arrangement is that of an Index of the Evidentiary Facts common to various classes of litigation.

In the preparation of the work, and settling on the terms in which I should state the rules I set forth, I have used the aid of an analytic or logical method, and considered the facts in groups according to their nature, such as facts of Consciousness, facts of ordinary Physical Observation, Scientific facts, etc., but for convenience of reference the results are arranged in this indexical order. A few deviations allowed from this arrangement, for obvious reasons, are indicated by cross references.

Several distinct advantages are to be found in the systematic preparation for trial, which is here illustrated. 1. The practitioner, by surveying the several modes of proof, is enabled to select his evidence more judiciously. 2. Having refreshed his memory on the precedents, he stands with much more confidence on his position, and speaks with more persuasiveness, even if, as is usually the case, he refrains from citing authorities; and 3, if the exigency of the argument calls for authority, he has it at hand.

AUSTIN ABBOTT.

71 Broadway, New York, May, 1889.

# BRIEF

ON

## The Modes of Proving Facts.

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ABANDONMENT.—[As to abandonment of property, see cases collected in 40 *Am. Dec.*, 464.]

§ 1. Direct Testimony.

§ 2. Declarations and Condition.

§ 1. *Direct Testimony*.—A witness may testify that a contract was abandoned, leaving details to be called out on cross-examination.

*Wallis v. Randall*, 81 *N. Y.*, 164, *aff'g* 16 *Hun*, 32; *s. P.*, 10 *Wall.* (*U. S.*), 367, 383.

§ 2. *Declarations and Condition*.—The declarations of a wife made immediately before her flight, manifesting her feelings, such as satisfaction,<sup>1</sup> or distress,<sup>2</sup> or made immediately afterward to the persons with whom she took refuge,<sup>3</sup> or to a third person,<sup>4</sup> are admissible as part of the *res gestæ*,<sup>5</sup> on the question of abandonment.

So is evidence of her physical condition.

The same principle applies to all persons.

<sup>1</sup> *Jacobs v. Whitcomb*, 64 *Mass.* (10 *Cush.*), 255. (Opin. by BIGELOW, C. J., in assumpsit against a husband for alleged necessities.)

<sup>2</sup> *McGowen v. McGowen*, 52 *Tex.*, 657 (divorce for abandonment).

<sup>3</sup> *Cattison v. Cattison*, 22 *Pa. St.*, 275 (divorce for desertion). *S. P.*, *McGowen v. McGowen*, 52 *Tex.*, 657.

<sup>4</sup> *Hoare v. Allen*, 3 *Esp.*, 276 (Ld. KENYON. *Crim. Con.* declarations as to cause of leaving).

<sup>5</sup> *Park v. Hopkins*, 2 *Bailey* (*S. C.*), 408.

judgment was confirmed without questioning this point, in 71 N. Y., 420.)

**ABILITY.**—[See also **CAPACITY, FEELINGS, HEALTH AND DISEASE, INTOXICATION, etc.** As to *Financial ability* see **INSOLVENCY.**]

§ 8. Direct testimony.  
9. Experiment.

§ 10. Witness's ability.

§ 8. *Direct testimony.*—A witness who has had continuous opportunity of observation, may, although not an expert, testify directly what ordinary acts a person was able or unable to do.

This is matter of fact, the result of observation, although involving in some measure opinion or judgment.

*Parker v. Boston, etc., Steamboat Co.*, 109 *Mass.*, 449; approved in *Comm. v. Sturtivant*, 117 *Id.*, 134.

*Sloan v. N. Y. Central R. R. Co.*, 45 *N. Y.*, 125.

*S. P., Adams v. People*, 63 *N. Y.*, 621; *aff'g 3 Hun (N. Y.)*, 654 (testimony that one's eyesight was good).

An expert may testify to the degree of physical and mental ability. *Beckwith v. N. Y. Central R. R. Co.*, 64 *Barb. (N. Y.)*, 299. But to testify that A having lost an eye, would not under given circumstances see an object as well as B who had not, it should appear that the expert had examined their eyes. *People v. Marsiler*, 70 *Cal.*, 98.

§ 9. *Experiment.*—On cross-examination, it is in the discretion of the court whether or not to require a party who has testified to a physical inability involved in the issue, to perform an act in the presence of the jury which may manifest its nature and extent.

*Ort v. Fowler*, 31 *Kan.*, 478; s. c., 23 *Am. L. Reg., N. S.*, 569, 577 (not error to require a defendant to read, whose defense to a note was that he signed in reliance on the false representations of its contents by the payee, because he was unable to read it).

*Hatfield v. St. Paul etc. R. Co.*, 33 *Minn.*, 130; s. c., 22 *Northwestern Rep.*, 176 (holding it not error to refuse to require plaintiff to walk after she testified she could not walk without limping).

*But compare Condition*; and *Criminal Trial Brief*, §§ 567, 591, etc.

§ 10. *Witness's ability.*—It is competent to ask a witness whether he was able to do a specified act,<sup>1</sup> or used the

best ability and skill that he possessed;<sup>2</sup> for his ability is a fact within his own knowledge.

<sup>1</sup> *People v. Tubbs*, 37 N. Y., 586.

<sup>2</sup> *Doyle v. N. Y. Eye & Ear Infirmary*, 80 N. Y., 631, 633. (Question to physician sued for malpractice. But whether the question was leading was not determined).

*S. P., Brink v. Hanover Fire Ins. Co.*, 80 N. Y., 108, 116. (Diligence in serving notice.)

ABSENCE.—[See also ABANDONMENT, DOMICIL, RESIDENCE, DESERTION, and *Criminal Trial Brief*, §§ 428, 429, 521.]

§ 11. Reputation.

12. Fact of letters received.

13. Contents.

14. Telegrams.

15. Entries by deceased.

§ 16. Answers to inquiries.

17. Presumption of continuance.

18. Public officer's absence.

19 and 20. Reasons for absence.

§ 11. *Reputation.*—Absence of a person from the State cannot be proved by general reputation.<sup>1</sup>

But general reputation is competent in corroboration of circumstantial evidence of absence.<sup>2</sup>

<sup>1</sup> *Bank v. Seawell*, 18 Ala., 616. In *Wheeler v. Webster*, 1 E. D. Smith (N. Y.), 1, the court refused to take judicial notice that Daniel Webster was not a resident of New York.

<sup>2</sup> Testimony that witness knew the person, and that he had recently broken up his establishment and was sold out, and thereafter either departed or kept concealed; that previous thereto witness saw him frequently, but since then not at all; and that it is generally understood and believed, etc., etc.—*Held* sufficient to give the magistrate jurisdiction under the statute as to absent and absconding debtors. *Matter of Faulkner*, 4 Hill (N. Y.), 598; *S. P., Van Alstyne v. Erwine*, 11 N. Y., 331.

§ 12. *Fact of letters received.*—Testimony of a witness that he has received letters from a deponent, apparently from places without the State, shortly before the trial, is competent proof of absence.

*Carman v. Kelly*, 5 Hun (N. Y.), 283 (so held for the purpose of excusing his non-production, and to let in his deposition *de bene esse*).

*Gaines v. Relf*, 12 How. (U. S.), 472, 534 (CATRON, J., delivering the opinion of the court, says "the date



of a letter is evidence to prove where the writer was, and the time when he wrote").

The like evidence was received in *Prince v. Blackburn*, 2 *East*, 250, to show absence of subscribing witness.

[For the presumption that letters received in answer are from the person addressed, see **LETTERS**.]

§ 13. —*contents*.—Letters written during absence from home are admissible in evidence, as explanatory of the nature of the departure and absence, the departure and absence being regarded as one continuous act.

*Rawson v. Haigh*, 2 *Bing.*, 99 ; cited in 22 *Pa. St.*, 277.

§ 14. *Telegrams*.—A telegram received in reply, purporting to be from a person apparently at a distant place, is not competent to show his absence.

*Howley v. Whipple*, 48 *N. H.* 487. The reason is that it is not an original. See note in 14 *Abb. N. C.*, 394.

*Contra*: *Conner v. State*, 23 *Tex. App.*, 378; s. c., 5 *Southwestern Rep.*, 189 (absence of witness, so as to let in deposition).

§ 15. *Entries by deceased person*.—To prove absence of a person since deceased, from a specified place, entries made by him in the course of professional duty, of official acts, the making of which would have required his presence at another place, are competent evidence that he was present at the latter place, at the time stated in such entries.

*Clark v. St. James Church*, 21 *Hun (N. Y.)*, 95.

§ 16. *Answers of third persons to inquiries*.—Answers given to inquiries duly made in search of a person, are not hearsay, but competent as part of the *res gestæ*, to show his absence.<sup>1</sup> Otherwise of hearsay statements, or answers not induced by due inquiry for the purpose.<sup>2</sup>

<sup>1</sup> *People v. Rowland*, 5 *Barb.*, (*N. Y.*), 449 (answers given at residence, and information derived from neighbors, on inquiry for a subscribing witness).

*S. P.*, *Bronner v. Frauenthal*, 37 *N. Y.*, 166, 169, 172 (inquiries at the usual stopping place within the State of a non-resident whose deposition had been taken *de bene esse*).

*S. P.*, *Buswell v. Links*, 8 *Daly (N. Y.)*, 518, 523, and cases cited (answers given at residences to a person calling to serve process).

To similar effect *Chase v. Lawson*, 36 *Hun (N. Y.)*, 221.

S. P., *Van Dyne v. Thayre*, 19 *Wend. (N. Y.)*, 162, 165 (holding that the absence of a subscribing witness should be shown by diligent inquiry at his former residence and by information derived from his neighbors).

To similar effect see *Jackson v. Chamberlain*, 8 *Wend. (N. Y.)*, 620; *Jackson v. Cody*, 9 *Cow. (N. Y.)*, 240.

*Contra*: *Fry v. Bennett*, 1 *Abb. Pr. (N. Y.)*, 289 (holding answers given at the residence to a person inquiring for a witness whose deposition had been taken *de bene esse*, were not competent as a ground for reading his deposition. S. P., 1 *Tay. Ev.*, 523 n.

Compare discussion in *Howard v. Holbrook*, 9 *Bosw. (N. Y.)*, 237; s. c. 23 *How. Pr. (N. Y.)*, 64 (holding that after being told that the principal was absent, calling again and finding one who answered to the name, and admitted identity, was sufficient evidence of identity to go to the jury).

Whether the rule is applicable in a criminal case to prove an element in the offense, Query—see FICTITIOUS PERSONS, § , and *Criminal Brief*, § 301, § 516.

2 *Comm. v. Ricker*, 131 *Mass.*, 581 (holding, on the trial of an indictment, that on the question whether defendant was in the commonwealth at a particular time, the testimony of a sergeant of police that on a certain day a police officer reported to him that he had seen the defendant in the street that night, is incompetent).

§ 17. *Presumption that absence continues.*—The fact of continued non-residence at a previous time having been shown, absence from this State at the present time may be inferred.

*Nixon v. Palmer*, 10 *Barb. (N. Y.)*, 175. (Rev'd on other grounds in 8 *N. Y.*, 398.)

S. P., *Rixford v. Miller*, 49 *Vt.*, 319.

§ 18. *Public officer's absence not presumed.*—Absence of one of several officers or other persons clothed with authority of a public nature, cannot be presumed from the mere fact that an official act or report was signed by the others only.

*Yates v. Russell*, 17 *Johns. (N. Y.)*, 461, 468 (referee's report sustained by contrary presumption).

*McCoy v. Curtice*, 9 *Wend. (N. Y.)*, 17 (warrant for collection of taxes sustained as justification to collector, by contrary presumption).

S. P., *Doolittle v. Doolittle*, 31 *Barb. (N. Y.)*, 312.

*Downing v. Rugar*, 21 *Wend. (N. Y.)*, 178, 184 (same of

proceedings of overseers of poor on which warrant was issued).

*Woolsey v. Tompkins*, 23 *Wend. (N. Y.)*, 324 (same in case of laying out a highway).

*Doughty v. Hope*, 3 *Den. (N. Y.)*, 249, 594, aff'd in 1 *N. Y.* (report of commissioners of estimate and assessment).

*S. P., Miller v. Garlock*, 8 *Barb. (N. Y.)*, 153.

*Colman v. Shattuck*, 2 *Hun (N. Y.)*, 497.

*Tucker v. Rankin*, 15 *Barb. (N. Y.)*, 471.

*People ex rel. Kingsland v. Bradley*, 64 *Id.*, 228 (official certificate signed by two, aided by the same presumption as to the presence of the third, the fourth being dead and the fifth having vacated the office by removal).

*Smith v. Helmer*, 7 *Id.*, 416 (proceedings by commissioners to alter highway).

*Horton v. Garrison*, 23 *Id.*, 176 (note given by school trustees).

§ 19. *Reason or motive for absence.*—On the question whether the absence of a person was with fraudulent intent, his declarations made about the time of his departure, or during his absence, and letters written by him during the absence, are competent against him.

*Brady v. Parker*, 67 *Ga.*, 636 (declarations just before departure).

*Smith v. Cramer*, 1 *Scott*, 541 (letters written a month prior to departure).

*Rouch v. Great Western Ry. Co.*, 1 *Q. B.*, 51, 61 (letters written during absence).

§ 20. — *competent in his own favor.*—Such declarations and letters may be competent in his own favor.

*United States v. Penn.*, 13 *N. Bankr. R.*, 641 (holding that where the question in issue was whether the defendant has absconded, his declarations made while on his way from his place of residence as to his intention of returning was competent in his favor).

Declarations made on return may be received. *Bateman v. Bailey*, 5 *T. R.*, 512 (a conversation with a bankrupt which passed on his return after nearly two days' absence was received).

But they must have been made soon after his return. *Lees v. Marton*, 1 *Mo. & R.*, 210.

*Marsh v. Meager*, 1 *Stark.*, 353 (holding that the conversation with the bankrupt not competent if it did not appear to be contemporary with the act or immediately subsequent).

# A BRIEF

FOR THE

## TRIAL OF CRIMINAL CASES.

---

By AUSTIN ABBOTT,

Assisted by WILLIAM C. BEECHER,  
Late Assistant District Attorney  
of the City of New York.

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To determine the policy of counsel, neither principles nor precedents alone suffice. In the conflict of precedents, a knowledge of sound principles is of paramount importance, but to apply a principle safely, attention to the technical significance of the precedents is essential.

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## LIST OF TOPICS TREATED.

- |   |   |
|---|---|
| I. COUNSEL.   | XXVIII. DEMAND OF COPY OF PANEL OF THE TRIAL JURY.      |
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| IV. CHALLENGES TO THE GRAND JURY.                   | XXXI. SELECTION OF JURORS BY EXAMINATION AND CHALLENGE. |
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Each of these topics are treated in detail; see the mode, for instance, in which *Removal of a Cause*, the *Grounds of Challenge*, and the *Competency of Evidence* are treated, indicated on the following specimen pages.

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## XV.—REMOVAL OF CAUSE.

## 1. FROM ONE STATE COURT TO ANOTHER, OR FROM ONE FEDERAL COURT TO ANOTHER.

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74. — effect of removal.

## 1. FROM ONE STATE COURT TO ANOTHER, OR FROM ONE FEDERAL COURT TO ANOTHER.

§ 66. *From inferior to superior State court*—Under statutes allowing removal from an inferior to a superior court “for cause shown,”<sup>1</sup> such good cause exists, not only when the obtaining of a fair and impartial trial requires the removal, but also whenever the situation and official standing of the accused, the widespread and clearly divided line of popular opinion, and the circumstances of the alleged crime, as well as the important legal questions which it presents, so magnify the importance of the cause as to justify its removal from the inferior to the superior tribunal for trial.<sup>2</sup>

<sup>1</sup>See, for instance, *N. Y. Code Crim. Pro.*, §§ 343-353; and *Commonw. v. Balph*, 3 *East. Rep.*, 593; s. c., 43 *Leg. Int.*, 162; and *U. S. R. S.*, § 1038 (providing for the removal of causes from the U. S. District to the Circuit court when difficult and important questions of law are involved).

<sup>2</sup>*People v. Sessions*, 10 *Abb. N. C.*, 192; followed in *People v. Squire*, 4 *N. Y. Crim. Rep.*, 444; s. c., 1 *N. Y. State Rep.*, 534; compare *People v. Rourke*, 11 *Abb. N. C.*, 89 (holding, upon an application to remove an indictment to oyer and terminer of the same county, that where there are no difficult legal questions to be passed upon, or they have already been passed upon by the court, an application of this kind would not be granted, simply because local feeling endangers a fair trial).

## 2. GROUNDS OF CHALLENGE (IN ALPHABETIC ORDER.)

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§ 232. *Adverse party in civil action.*—That the proposed juror is a party adverse to the defendant in a civil action, is a ground of challenge for implied bias, and an absolute disqualification as matter of law, if the action implies malice or displeasure.<sup>1</sup>

If not, it is not necessarily, as matter of law, a disqualification at common law, but the question is whether he is actually biased.<sup>2</sup>

<sup>1</sup> *Cow. (N. Y.), 438 note.*

<sup>2</sup> *Id.* But *N. Y. Code Crim. Pro.*, § 376, *subd.* 1, § 377, *subd.* 3, disregards the distinction, and makes it a disqualification as matter of law in all cases.

§ 233. *Affinity.*—Affinity within the ninth degree to the person alleged to be injured by the crime charged, or on whose complaint the prosecution was instituted, or to the defendant, is, as matter of law, a disqualification.

See authorities cited under Consanguinity, § 250, *below*.

§ 234. — *how constituted.*—The affinity must consist in a direct marriage tie between one of such persons and the other, or the blood relations of the other. Affinity by reason of the marriage of a relation of one to a relation of the other raises only a question whether there is bias as matter of fact.

*Moses v. State*, 11 *Humph. (Tenn.)*, 232 (holding competent, on an indictment for murder, a proposed juror who stated that the sons of his wife by a former husband were second cousins to the deceased, and that his wife was still living.)

*S. P., Proffatt on Juries*, § 174.

§ 235. — *termination.*—The affinity must be one subsisting at the time. The death of one of the parties to the marriage through which it is traced, without leaving issue of such marriage surviving, terminates the affinity.

*Bishop Crim. Proc.*, § 901.

*Proffatt on Juries*, § 174.

*State v. Shaw*, 3 *Ire. (N. C.)*, 532 (holding competent a



## XXXIX.—RULES OF EVIDENCE.

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## 1. ACCOMPLICE AS A WITNESS.

[The general principle is that accomplices are now competent for or against each other, unless jointly indicted; and even if jointly indicted they are competent against each other if separately tried. But the courts have a discretion whether to allow one to be used against the other, because this may imply a promise of immunity.]

As to who is an accomplice, see INSTRUCTIONS.

- § 372. Competency for the prosecution.
373. — how made competent for prosecution at joint trial.
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375. Competency for each other.
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380. — of witness.
381. Extent of privilege.
382. — waiver of privilege.
383. Cross-examination of accomplice.
384. Right to prove agreement to testify.

§ 372. *Competency for the prosecution—subject to discretion of court.*—Accomplices, whether related as principal and accessory, or equally concerned in guilt, are, except on a joint trial of a joint indictment, competent witnesses for the prosecution.<sup>1</sup> But the court has power to refuse to allow the testimony of one who has not been finally convicted to be received against his accomplice; because of public policy, in view of the implied promise of immunity which results from receiving his testimony.<sup>2</sup>

<sup>1</sup> *People v. Whipple*, cited in next note.

In *People v. Lohman*, 2 *Barb. (N. Y.)*, 216, the court say: "The law is well settled that a principal is a competent witness against an accessory. So also are accomplices against the copartners in crime."

S. P., *People v. Costello*, 1 *Den. (N. Y.)*, 83. [The rule is unquestioned, though the former idea, that the woman is an accomplice in an abortion practised on herself, is now abandoned.]

*Allison v. State*, 14 *Tex. App.*, 402, *held* (under *Texas Code Crim. Pro., Art. 730*), no error to admit an accomplice as a witness for the State where the defendant was separately indicted and separately tried.

And see authorities under §§ 375–377 *below*.

It makes no difference that he is induced to testify by a promise of immunity; for the rule that a confession so induced is not competent, applies only to confessions by the accused. *People v. O'Neil*, 48 *Hun (N. Y.)*, 36.

<sup>2</sup> *People v. Whipple*, 9 *Cow. (N. Y.)*, 707 (on motion to examine principal against accessory on trial of accessory, after conviction of principal, but before judgment thereon—*Held*, that he was competent; but the court in its discretion should refuse to allow him to be used as a witness. DUER, C. J., says: "The principle deducible from the cases undoubtedly is that an accomplice, although a competent witness against the associates and partners of his guilt, is nevertheless only admissible from reasons of judicial necessity and policy, and in furtherance of the essential ends of public justice. And the question always addresses itself to the discretion of the court; not to their judgment as to the general competency of the witness, but to their sound legal discretion, whether, upon a full consideration of the facts and circumstances of the case, he shall be permitted to testify under an implied promise of pardon, which vests in him an equitable title thereto if he speaks the truth."

for the purpose of contradicting his testimony by proof of such statements.

*State v. Red*, 53 *Iowa*, 69.

*State v. Abrams*, 11 *Oreg.*, 169.

*Comm. v. Tolliver*, 119 *Mass.*, 312.

As to the the limits of this rule, see § 405 (below).

§ 404. — — *privileged communications.*—The accused when testifying in his own behalf, cannot be compelled to disclose privileged communications had between him and his attorney or counsel.

*Duttenhofer v. State*, 34 *Ohio St.*, 91, abstr.; s. c., 18 *Alb.*

*L. J.*, 297 (disapproving the Massachusetts case, *below*).

And to same effect *Bigler v. Reyher*, 43 *Ind.*, 112.

*S. P., N. Y. Code Civ. Pro.*, §§ 835, 836.

*Alderman v. People*, 4 *Mich.*, 414 (*Dictum*).

*Hemenway v. Smith*, 28 *Vt.*, 701.

*Barker v. Kuhn*, 38 *Iowa*, 392, (holding that the enabling act should not be construed as opening the door which had been locked at common law.)

*State v. White*, 19 *Kan.*, 445; s. c., 27 *Am. R.*, 137 (*held* reversible error to compel the accused on cross-examination to disclose communications between himself and counsel in respect to which he did not testify on his direct examination. The court said: "The true view seems to be that communications which the lawyer is precluded from disclosing, the client cannot be compelled to disclose.")

*Contra* :

*Comm. v. Nichols*, 114 *Mass.*, 285. *Dictum*, that "a party taking the stand as a witness in his own behalf may be cross-examined in relation to a communication between himself and his counsel as to which the latter would not be allowed to testify." Citing *Woburn v. Henshaw*, 101 *Mass.*, 193 (civil case).

§ 405. *Statutory limits of cross-examination.*—In those jurisdictions where the statute allowing the accused to be a witness expressly provides for a cross-examination bounded by the limits of the direct,<sup>1</sup> it is implied that he can be cross-examined no further; and it is an error to allow him, against objection, to be cross-examined generally, either as to matters relevant to the













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